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# 92-1131

No.____

Supreme Court, U.S.
FILED
DEC 30 1992
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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

**October Term, 1992**

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**WILLIAM T. "TOM" HOLLIS,**

**Petitioner,**

**v.**

**UNITED STATES OF AMERICA,**

**Respondent.**

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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December, 1992

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118 pp

# QUESTIONS PRESENTED

Petitioner was tried in the District Court for the Western District of Oklahoma on a ten count Indictment; ultimately, the jury returned a verdict of guilty as to Petitioner on all counts except Count 9. Petitioner was consequently sentenced under the Sentencing Reform Act, Federal Sentencing Guidelines, to a term of 57 months in the custody of the Federal Bureau of Prisons. However, prior to trial and the resulting sentencing, Petitioner moved the District Court to dismiss Counts 5, 6, 7, 9 and 10 of the Indictment based upon the grounds of Multiplicity. The District Court neither dismissed said Counts nor required the Prosecution to elect between the multiplicious charges, instead allowing all Counts against Petitioner to go before the jury.

The questions presented are:

**(1)** Whether an Indictment may simultaneously charge mail fraud and engaging in a monetary transaction in interstate commerce in criminally derived proceeds when the alleged crime arises out of a single episode and where a necessary element for a conviction for engaging in a monetary transaction count is a conviction on the mail fraud count.

**(2)** Whether the Fifth Amendment Double Jeopardy Clause is violated by successive prosecution in a single trial for offenses of mail fraud and engaging in a monetary transaction where the conviction for mail fraud is a lesser included element or a species of the engaging in a monetary transaction offense.

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The application of the Fifth Amendment Double Jeopardy Clause in cases involving successive prosecution varies on a case by case analysis. Because there is no clear or concise rule to follow in applying the Double Jeopardy Clause to successive prosecutions, the lower Courts are arbitrarily applying the guidelines announced in *Garrett v. United States*, 471 U.S. 773, 105 S.Ct. 2407, 85 L.Ed.2d 548 (1985); *United States v. Felix*, 60 U.S.L.W. 4259, 112 S.Ct. 1377, 118 L.Ed.2d 25 (1992); *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); and *Grady v. Corbin*, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990).

Because of the lower Courts arbitrary application of the differing rules governing the application of the Double Jeopardy Clause, this Court needs to set forth clear

principles and guidelines as guidance to the lower Courts in Fifth Amendment application. Specifically, this case gives the Court the opportunity to address what Double Jeopardy Clause principles govern in prosecutions involving continuous, long-term, multi-jurisdictional and ongoing criminal episodes verses, the principles that apply to the prosecution of cases involving a single occurrence or single transaction

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# IN THE
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## October Term, 1992

**WILLIAM T. "TOM" HOLLIS,**

**Petitioner**

**v.**

**UNITED STATES OF AMERICA,**

**Respondent.**

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on July 31, 1992, and it's resulting Judgment denying Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc, entered on September 11, 1992.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is published at 971 F.2d 1441, (10th Cir. 1992), and is included

herewith as Appendix "A". Further, the Judgment of the Tenth Circuit entered on September 11, 1992, in response to Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc is included herewith as Appendix "B".

## JURISDICTION

The jurisdiction of this Court is respectfully invoked pursuant to the authority of Title 28, §1254(1) of the United States Code. The opinion of the United States Court of Appeals for the Tenth Circuit was filed on July 31, 1992. That Court's Judgment denying Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc was entered September 11, 1992. Further, an Extension of Time to File Petitioner's Writ of Certiorari was granted by this Court, extending the filing date an additional twenty (20) days beyond the original filing date of December 10, 1992. Therefore, the time in which to file this Petition for Certiorari extends until and includes December 30, 1992. This Petition for Certiorari was filed by that date.

## CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States, Double Jeopardy Clause, provides in part as follows:

> "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb..."

## STATEMENT OF THE CASE

William T. "Tom" Hollis petitions this Court to grant a Writ of Certiorari to the United Sates Court of Appeals for the Tenth Circuit.

This Petition raises two substantial issues:

1. Whether an Indictment may simultaneously charge a count of mail fraud, a violation of Title 18, §1341 of the United States Code, and a count of engaging in a monetary transaction in interstate commerce in criminally derived proceeds, a violation of Title 18, §1957(a) of the United States Code, when the alleged crime arises out of a single episode and where a necessary element for a conviction for engaging in a monetary transaction count is a conviction on the mail fraud count.

2. Whether the Fifth Amendment Double Jeopardy Clause is violated by successive prosecution in a single trial for offenses of mail fraud and engaging in a monetary transaction where the conviction for mail fraud is a lesser included element or a species of the engaging in a monetary transaction offense.

Petitioner submits that, on the facts of this case, it was in violation of Petitioner's Fifth Amendment Right against Double Jeopardy for the Government to try him on the multiplicitous Indictment. By virtue of the District Court's failure to require the Prosecution to elect between the counts and/or dismiss those multiplicitous counts, Petitioner was ultimately denied his Constitutional Fifth Amendment Right against Double Jeopardy.

The Petitioner, William T. "Tom" Hollis, was indicted along with his wife, Pamela Sue Hollis, in a ten count Indictment in the United States District Court for the Western District of Oklahoma on February 6, 1991. The District Court assumed original jurisdiction in the matter pursuant to Title 18, §3231 of the United States Code. The necessary facts for this Petition for Writ of Certiorari deal with Counts 4, 5, 6, 7, 8, 9 and 10. Said Indictment is included herewith as Appendix "C".

This Petition for Writ of Certiorari deals with two separate and distinct "criminal episodes". The first "criminal episode" alleged is that contained within Counts 4, 5, 6 and 7 of the Indictment. It involves the burglary of Petitioner's residence on December 3, 1988, to include the dealings with Petitioner's insurance company and the resulting receipt of

insurance drafts relating thereto.

Specifically, Count 4 of the Indictment alleged that the Petitioner committed the offense of mail fraud. Said count alleged that the United States mails were used in mailing a sworn statement in proof of loss to the Petitioner at his residence in Oklahoma City. The Government contended that this mailing was in furtherance of a scheme to defraud Farmers Insurance Group by means of an alleged fraudulent insurance claim.

Next, Counts 5, 6, and 7 alleged that the Petitioner committed the offenses of engaging in a monetary transaction in interstate commerce in criminally derived proceeds. Consequently, Counts 5, 6, and 7 involve the insurance proceeds received in payment of the burglary insurance claim, as alleged in Count 4 of the Indictment.

All of Counts 4 through 7 of the Indictment concern themselves with the transactions involving the insurance company and the Petitioner in relation to the burglary claim. Likewise the "criminally derived proceeds" are the insurance company drafts that were issued to the Petitioner.

The second seperate and distinct "criminal episode" encompasses Counts 8, 9 and 10 of the Indictment. Pursuant to this "incident", Count 8 of the Indictment alleged the Petitioner committed the offense of mail fraud by causing the United States mails to be used in mailing a property loss report to Farmer's Insurance claims office in Oklahoma City. Again, the Government alleged that the mails were used to further an alleged insurance fraud. This "alleged criminal incident" involved an insurance claim on Petitioner's business real estate. The basis of this claim resulted from lightning damage to Petitioner's building and/or the surroundings in the contiguous area.

Counts 9 and 10 of the Indictment each alleged that the Petitioner committed the offense of engaging in a monetary transaction in interstate commerce in criminally derived proceeds. Again, Counts 9 and 10 of the Indictment are the insurance proceeds of the insurance company issued as

a result of the loss suffered to the to Petitioner's real estate, and the subject of Count 8 of the Indictment involving mail fraud.

The Petitioner went through a jury trial on May 17, 18, 28, 29, 30, 31, June 3, 4, 5, 6 and 7, 1991. The jury returned a verdict as to Petitioner of "guilty" on Counts 1, 2, 3, 4, 5, 6, 7, 8 and 10. The Petitioner was acquitted of Count 9 of the Indictment.

Sentencing was pursuant to the Sentencing Reform Act, Federal Sentencing Guidelines. On August 6, 1991, the Petitioner was sentenced to a term of 57 months in custody of the Federal Bureau of Prisons on Counts 1, 2, 4, 5, 6, 7, 8, and 10, and 24 months on Count 3 to be served concurrently. The Petitioner was further placed on supervised probation of three years on Counts 1, 2, 4, 5, 6, 7, 8 and 10, and one year supervised probation on Count 3 to run concurrently, upon release from prison. The District Court further fined the Petitioner $141,598.00 and ordered restitution to Farmers Insurance Group of Companies in the amount of $141,598.00. However, the Tenth Circuit vacated said fine; the United States District Court for the Western District subsequently imposed a fine in the amount of $10,000.00. There was also a special assessment imposed in the amount of $450.00, as ordered by the District Court. The Judgment and Sentence of that District Court is included herewith as Appendix "D".

The Petitioner timely filed his appeal with the United States Court of Appeals for the Tenth Circuit, as an appeal of right from entry of judgment, pursuant to Federal Rules of Appellate Procedure 4(b), Title 18, §3742(a) and Title 28, §1291 of the United States Code. This appeal, in part took issue with the double jeopardy violations and the multiplicitous counts contained within the Indictment. Subsequently, the panel issued it's opinion on July 31, 1992, concluding that the prosecution, along with the subsequent convictions on mail fraud and engaging in a monetary transaction in interstate commerce in criminally derived proceeds did not violate the Double Jeopardy Clause. This opinion is attached hereto as Appendix "A".

Petitioner then timely filed his Petition for Rehearing and Suggestion for En Banc Consideration with the Tenth Circuit. On September 11, 1992, that court entered it's Judgment denying Petitioner's Petition and Suggestion. This Judgment is attached hereto as Appendix "B".

Lastly, Petitioner then filed his Application for Extension of Time in Which to File Petition for Writ of Certiorari. This Court granted said Application on December 4, 1992 and extended Petitioner's filing date until and to include December 30, 1992.

The Petitioner maintains that his double jeopardy claim was further intensified by the trial court when it instructed the jury on the essential elements of engaging in a monetary transaction, Instruction #29. The United States District Court for the Western District of Oklahoma stated as follows:

> You are instructed that both defendants are charged in Counts 5, 6, and 7 of the Indictment and Defendant Tom Hollis is also charged in Counts 9 and 10 with violating Title 18, § 1957(a) of the United States Code. Section 1957 provides in pertinent part that:
>
> > Whoever [within the United States] knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000...[shall be guilty of an offense against the laws of the United States].
>
> In order to establish the offense of money laundering, the Government must prove each of the following essential elements beyond a reasonable doubt:
>
> FIRST: That the defendant knowingly

engaged in a monetary transaction within the United States;

SECOND: That the defendant used criminally derived property of a value greater than $10,000 in the transaction;

THIRD: That the defendant knew that the property used in the monetary transaction was the proceeds of criminal activity;

FOURTH: That the proceeds were in fact derived from a mail fraud.

In this regard, you are instructed that the term "monetary transaction", as used in this instruction, means the deposit, withdrawal, transfer, or exchange of funds in or affecting interstate commerce, by, through, or to a financial institution. A federally insured bank is a "financial institution" for the purposes of this section.

The term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense.

As I have instructed you, it is necessary for the United States to prove that the Defendant knew that the monetary transaction involved criminally derived proceeds. It is also the Government's burden to show that the proceeds were derived from a mail fraud. However, the United States is not required to prove that the defendant knew that the proceeds were from mail fraud; rather, the Government must establish that the Defendant was aware that the proceeds were derived from some criminal offense.

> **Finally, with respect to this offense, you are instructed that if you find a defendant not guilty on Count 4, then you must find him or her not guilty on Counts 5, 6 and 7. If you find Defendant not guilty on Count 8, then you must find him not guilty on Counts 9 and 10.** (Emphasis Added).

The Petitioner argued to the trial court, as well as to the United State Court of Appeals for the Tenth Circuit, that the District Court's instruction, as reproduced above, and the law defining engaging in a monetary transaction, make a **conviction** of the offense of mail fraud in Counts 4 and 8 of the Indictment an essential element to the offenses as alleged in Counts 5, 6, 7, 9 and 10. Without a conviction in Counts 4 and 8, the remaining counts would be lacking elements essential to conviction and would thereby mandate verdicts of "not guilty". Further, Petitioner asserted that those counts, as contained within the Indictment, are multiplicitous and in further violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. It is upon these grounds that Petitioner respectfully submits his cause to this Court.

## REASONS FOR GRANTING THE WRIT

The convictions of Petitioner were obtained in direct violation of the Fifth Amendment, Double Jeopardy Clause. These violations occurred due to the Government's attempt to prosecute and have this Petitioner receive multiple sentences for the same conduct. In the immediate instance, the sentence of Petitioner was based upon and determined by the Federal Sentencing Guidelines, as required for the engaging in a monetary transaction convictions.

The offense in Count 4 (mail fraud) arose out of a burglary of the Petitioner's residence on December 3, 1988. The Government's charge of engaging in a monetary transaction involved three separate insurance drafts, as outlined in Counts 5, 6 and 7.

Count 8 of the Indictment alleged the crime of mail fraud. This count of the Indictment was based upon an insurance claim on the Petitioner's business office, caused by lightning damage on June 13, 1989. Counts 9 and 10 of the Indictment were based upon insurance company drafts issued to the Petitioner and forming the basis of the Government's charges of engaging in a monetary transaction.

In each of these alleged criminal episodes, the Government was seeking multiple prosecution and punishment for one offense.

The Double Jeopardy Clause states:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb ...

United States Constitution, Fifth Amendment.

## QUESTION ONE

---

**Whether an Indictment may simultaneously charge mail fraud and engaging in a monetary transaction in interstate commerce in criminally derived proceeds when the alleged crime arises out of a single episode and where a necessary element for a conviction for engaging in a monetary transaction count is a conviction on the mail fraud count.**

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Multiplicity occurs when one offense is charged in two or more counts of the same indictment. The principle danger of multiplicitous indictments is that the defendant will be given multiple sentences for the same offense. *United States v. Urlacher*, 784 F.Supp. 61, 65 (W.D.N.Y. 1992). Thus, the multiplicious indictment raises a similarly serious problem as a defendant who receives multiple sentences for the same offense. Clearly, this is in violation of the Double Jeopardy Clause. See

*United States v. Hearod*, 499 F.2d 103 (5th Cir. 1974).

In *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 1980, 76 L.Ed 306 (1932), this Court recognized that the Double Jeopardy Clause of the Fifth Amendment prohibited successive prosecution for the same criminal act or transaction under two criminal statutes. *Blockburger* held that double jeopardy violations do not occur when one offense does not require proof of one fact or element that the other offense requires.

Since the ruling of *Blockburger* in 1932, the Supreme Court has modified that rule on successive prosecutions, finding such violative of the Double Jeopardy Clause. See *Illinois v. Vitale*, 447 U.S. 410, 65 L.Ed.2d 228, 100 S.Ct. 2260 (1980), wherein this Court suggested that, even if two successive prosecutions were not barred by the *Blockburger* test, the second prosecution would be barred if the prosecution sought to establish an essential element of the second crime by proving the conduct for which the defendant was convicted of in the first prosecution.

In *Grady v. Corbin*, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), a new standard was adopted which does not rely solely on the *Blockburger* test to vindicate Double Jeopardy Clause protection against multiple prosecution claims.

> Because of these independent concerns, we have not relied exclusively on the *Blockburger* test to vindicate the Double Jeopardy Clause's protection against multiple prosecutions. As we stated in *Brown v. Ohio*:
>
> > "The *Blockburger* test is not the only standard for determining whether successive prosecutions impermissible involved the same offense. Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second

> prosecution requires the re-litigation of factual issues already resolved by the first." 432 U.S. at 166-167, in Note 6, 53 L.Ed.2d 187, 97 S.Ct. 221.

*Grady v. Corbin*, 109 L.Ed.2d at 563.

Other decisions of this Court have not applied the *Blockburger* test in determining multiple prosecutions and multiplicity issues. See *Whalen v. United States*, 445 U.S. 684 (1980). The Court determined that a defendant could not be separately punished for rape and for killing the same victim in the perpetration of the rape. See also, *Harris v. Oklahoma*, 433 U.S. 682, 53 L.Ed.2d 1054, 97 S.Ct. 2912 (1977), where a defendant was convicted of felony murder based upon conduct of participating in a store robbery with another person who shot the clerk, and was then tried and convicted of robbing the store. The Court reversed the store robbery lesser-included-crime which was proved in the offense of felony murder.

The successive prosecution in the case at bar was mandated by the trial court's Instruction #29. Without convictions for mail fraud, there could be no convictions for engaging in a monetary transaction. Although there may have been one trial in this cause, the application of the trial court's instruction and the Government's theory resulted in the violative successive prosecutions condemned by this Court.

The Petitioner contended to the Tenth Circuit, as well as the United States District Court, that in obtaining convictions in Counts 5, 6, 7, 9 and 10, the Government first proved and obtained convictions for the violations as outlined in Counts 4 and 8 of the indictment. This is exactly the situation that this Court in *Harris v. Oklahoma* sought to prohibit.

In *Grady v. Corbin*, deficiencies were recognized in the *Blockburger* analysis.

> These cases all recognize that a technical comparison of the elements of the two offenses as required

> by *Blockburger* does not protect defendants sufficiently from the burdens of multiple trials. This case similarly demonstrates the limitations of the *Blockburger* analysis. If *Blockburger* constituted the entire double jeopardy inquiry in the context of successive prosecutions, this State could try *Corbin* in four consecutive trials: . . . The State could improve it's presentation of the proof with each trial assessing which witnesses gave the most persuasive testimony, which documents had the greatest impact, and which opening and closing arguments most persuaded the jurors. *Corbin* would be forced either to contest each of these trials or to plead guilty to avoid harassment and expense. 109 L.Ed.2d at 564.

The Court in *Grady* held, "**the Double Jeopardy Clause bars any subsequent prosecution in which the Government, to establish an essential element of the offense charged in the prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted.**" 109 L.Ed.2d at 564; (emphasis added). Finally, so there can be no doubt as to the test to be applied concerning double jeopardy and successive prosecution or multiplicity, this Court held "[w]e have concluded that the Double Jeopardy Clause of the Fifth Amendment demands application of the standard announced today . . ." 109 L.Ed.2d at 566.

Further, the Second Circuit has previously entered it's decision of *United States v. Calderone*, 917 F.2d 717 (2nd Cir. 1990) which is relative to the case at bar. In *Calderone*, the defendant won a directed verdict based upon insufficiency of the evidence in an international multi-drug smuggling conspiracy case. The Government then filed a new, narrower indictment overlapping the old indictment in time and in some overt acts. The *Calderone* Court held that the same conduct test of *Grady* barred prosecution on all counts.

Had this "new standard" been applied to the facts of this case, the outcome of Petitioner's trial would have been different. (See the Order of

the United States District Court for thge Western District of Oklahoma, included herewith as Appendix "F"). Pursuant to this "new standard" upon which *Grady* was based, the Government must first have obtained a conviction of Count 4 in order to obtain multiple convictions of Counts 5, 6, 7, and, likewise, the Government must have obtained a conviction in Count 8 in order to obtain multiple convictions in Counts 9 and 10. Thus, pursuant to *Grady*, the Double Jeopardy Clause bars the prosecution and sentencing on the charges of engaging in a monetary transaction. Consequently, the sentence would have been substantially lower without the multiplicitious convictions for engaging in a monetary transaction.

It is of consequence to note that the Tenth Circuit, in it's opinion in Petitioner's cause, relied heavily on *United States v. Lovett*, 964 F.2d 1029 (10th Cir. 1992), wherein the Tenth Circuit stated that Congress intended to punish both offenses separately. In *Lovett*, the lower court stated "there is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has the power to prohibit and punishing also the completed transaction". 964 F.2d at 1042.

In turn, the court in *Lovett* relied strongly on this Court's decision of *Garrett v. United States*, 471 U.S. 773, 105 S.Ct. 2407, 85 L.Ed.2d 764 (1985) for it's decision. However, *Garrett* did not end the Fifth Amendment constitutional inquiry with the authority of Congress to create new crimes and additional punishments.

> Where the same conduct violates two statutory provisions, the first step in the double jeopardy analysis is to determine whether the legislature -- in this case Congress -- intended that each violation be a separate offense. If Congress intended that there be only one offense -- that is a defendant could be convicted under either statutory provision for a single act, but not under both -- there would be no statutory authorization for a subsequent prosecution after conviction of one of the two provisions, and that would end the double jeopardy

analysis. 471 U.S. at 778.

The *Garrett* decision went further to look at the legislative history to make a determination as to whether or not Congress intended to create a separate continuing criminal enterprise offense. As the *Garrett* Court found, the intent of Congress was that there be a new crime and a new punishment for both the predicate offense and the continuing criminal enterprise offense.

However, this Court again did not end it's constitutional inquiry there.

> Having determined that Congress intended CCE to be a separate offense and that it intended to permit prosecution for both the predicate offense and the CCE offense, we must now determine whether prosecution for a CCE offense after an earlier prosecution for a predicate offense is constitutional under the Double Jeopardy Clause of the Fifth Amendment. The Double Jeopardy Clause provides:
>
> > "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb"
>
> The critical inquiry is whether a CCE offense is considered the "same offense" as one or more of it's predicate offenses within the meaning of the Double Jeopardy Clause. 471 U.S. at 786.

This Court in *Garrett* went through a exhaustive analysis, comparing the *Garrett* prosecution to the prosecution in *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). The Court drew distinction between a single act, as was the case in *Brown v. Ohio,* and compared it to the multi-layered conduct which was complex and long term, covering a period of time of almost 5½ years, in *Garrett*.

By comparison, the convictions in the Hollis case are of even simpler and shorter term conduct than that in *Brown v. Ohio*. The transactions and conduct in the Petitioner's case involve a single criminal act, occurrence or episode which the prosecution has chosen to break down into multiple units, exhibited as various different counts of the indictment, in an attempt to stairstep prosecution. This similar tactic was practiced in *United States v. Garrett*. Such an analysis and application cannot withstand Fifth Amendment Double Jeopardy inquiry. The Fifth Amendment inquiry in the Petitioner's case is consistent with the United States Supreme Court decision in *Grady v. Corbin*, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990).

It can hardly be argued that the State of New York, in prosecuting Corbin, did not intend and seek to have separate punishments for each of the offenses of which Grady was charged: driving under the influence, failing to keep right of a median, and reckless manslaughter, second degree vehicular manslaughter and criminally negligent homicide. Each of these offenses was specifically unique in and of themselves and each had a specific separate punishment provision which the legislature of the State of New York had enacted as separate punishment for those offenses.

In *Grady v. Corbin*, the Court refused to allow the New York legislature to authorize stair-stepping prosecution where a conviction for one offense is an essential element of another offense which forms another step in the prosecution which is another essential element for another offense which ultimately ends when the legislature decides to quit creating new offenses and punishments.

In the *Lovett* case, and the Petitioner's case, the Tenth Circuit failed to apply the full analysis and rational of *Garrett*. In contrast, this Court in *Garrett* went through an intensive review of facts and circumstances by comparing and distinguishing *Brown v. Ohio*. Had such an analysis been done, the Petitioner's case is clearly a single transaction and would fall within the *Brown v. Ohio* and *Grady v. Corbin* double jeopardy analysis. See, *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 221, 53 L.Ed.2d 187 (1977) and *Grady v. Corbin*, 495 U.S. 508, 110 S.Ct. 2084,

109 L.Ed.2d 548 (1990).

The Court in *Brown* recognized that the legislature remains free to define crimes; however, once the legislature has acted, courts may not impose more than one punishment for the same offense. "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid it's limitation by the simple expedient of dividing a single crime into a series of temporal or spatial units." 432 U.S. at 169.

Additionally, the District Court for the Western District of Oklahoma, in Instruction #6, advised the jury as follows:

> You are instructed that a separate crime or offense is charged in each count of the indictment. Each crime or offense is charged and the evidence applicable thereto should be considered separately, and the guilt or innocence of each defendant as to each count or offense should likewise be considered separately.
>
> The fact that you may find one or both of the defendants guilty or not guilty as to the crime or offense charged in one count should not control your verdict with reference to the other counts or offenses.

As the District Court indicated in it's instructions, "the count or offense should likewise be considered separately". This instruction, as applied to the Double Jeopardy Clause, forbids multiple prosecution for the offenses outlined in Counts 5, 6, 7, 9 and 10. The Fifth Amendment to the United States Constitution forbids multiple prosecutions for those offenses after the jury found the Defendant guilty of Counts 4 and 8.

Argument has previously been made that, since all offenses had been charged in a single prosecution, this distinction is critical and *Grady* does not apply. That rationale fails to recognize that the convictions in Counts 4 and 8 had to occur prior to the convictions in Counts 5, 6, 7, 9 and 10, since those convictions are elements of engaging in a monetary

transaction. In *Grady*, it was the conviction of the acts of the lesser-included offense that triggered the double jeopardy bar. In Petitioner's case, it is not only the acts, but the conviction of the acts that was an element of engaging in a monetary transaction.

In *Grady*, the Defendant could, in a single prosecution, have been acquitted of the lesser-included offense and convicted of the greater offense. In Petitioner's case, an acquittal of Counts 4 and 8 barred convictions in Counts 5, 6, 7, 9 and 10.

This is particularly true in light of the Court's instruction to the jury, Instruction #29, which provided in pertinent part:

> "Finally, with respect to this offense [engaging in a monetary transaction] you are instructed that if you find a defendant not guilty on Count 4, then you must find him or her not guilty on Counts 5, 6 and 7. If you find Defendant Tom Hollis not guilty on Count 8, then you must find him not guilty on Counts 9 and 10."

Further, the Tenth Circuit, in the *Lovett* case, through strained construction, found that the legislative history of engaging in a monetary transaction shows Congress' intent to separately punish a defendant for a monetary transaction that followed in time the underlying specified unlawful activity. 964 F.2d at 1042.

However, as set forth in Footnote Number 7 of the opinion of the Tenth Circuit, Congress did not submit a Senate or House report along with the Anti-Drug Abuse Act of 1986 and the legislative history and intent is not contained within P.L. 99-570 or 100 Stat. 3207. Additionally, contrary to the opinion of the court in *Lovett*, a review of Senate Report Number 99-433 and House Report Number 99-855 does not support the Tenth Circuit's conclusion in *Lovett* that Congress intended to impose separate punishments for violations of Title 18 § 1957 and corresponding violations of Title 18, § 2314 of the United States Code.

Specifically, a careful review of Senate Report Number 99-433 provides in the "Purpose" portion of that report: "[T]o enhance the penalties under existing law in order to further deter the growth of money laundering." (Page 1). Nowhere contained within this report does it indicate that there should be separate punishments in addition to those for already existing offenses of the same conduct and/or transactions.

Additionally, as contained in House Report Number 99-855 at Page 16, under Subsection (b) - "Punishment" - there seems to be a clear intent on the part of Congress that there **not be cumulative or separate punishment for additional violations**. (Emphasis added). Instead, Congress specifically provided that the court look to the seriousness of the crime or underlying activity which generated the criminally derived property in determining an appropriate punishment: **"In addition to other appropriate factors, the Committee expects a sentencing court to take into consideration the seriousness of the crime which generated the criminally derived property."** The clear legislative intent of such a statement could only mean that, once an individual was prosecuted, convicted and, when punishment was imposed, the court could consider the underlying activity which generated the criminally derived property as a factor at sentencing and not as a basis for separate and cumulative punishment.

Applying the clear legislative intent found in House Report Number 99-855, at sentencing, had Petitioner only been convicted of the engaging in a monetary transaction, the legislative intent would have the court consider the seriousness of the underlying mail fraud charge in determining an appropriate sentence.

However, because of the manner in which the Indictment was drafted, the Government's theory of prosecution and the trial court's Instruction #29, there could not have been a conviction solely of engaging in a monetary transaction.

Clearly, by examination of the Senate and House Report, this case is distinguishable from *Missouri v. Hunter*, 459 U.S. 359, 103 S.Ct. 673,

74 L.Ed.2d 535 (1983). In that particular case, there was a statute which specifically provided that the punishment was in addition to any punishment provided by law for the crime which the defendant may have committed.

> Any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the Division of Corrections for a term not less than three years. **The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with or through the use, assistance, or aid of a dangerous or deadly weapon.** No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years. 459 U.S. at 362. (Emphasis added).

The legislative intent in *Missouri v. Hunter* was set forth specifically in the punishment provision of the statute.

Furthermore, the Tenth Circuit in this cause misinterpreted the Petitioner's argument. Such is evidenced in Footnote #4 in the opinion of the lower court, where the Tenth Circuit panel states that engaging in a monetary transaction is not a lesser or included offense to the charge of mail fraud.

The Tenth Circuit stated in Footnote #4 of the opinion:

> The Hollises also argue that even if under some factual setting a defendant may properly be convicted under both statutes, here the scheme to defraud, as alleged in this indictment, encompass depositing checks in order to obtain insurance money. Consequently, they argue that they are being charged under both statutes for exactly the

> same conduct. Whatever difference this may have made if true, the fact remains that depositing checks is not encompassed within any alleged element of mail fraud. In Counts 4 and 8, the Indictment alleges inter alia that the Hollises devised a scheme to obtain money. The Hollises' actual success in obtaining money (by negotiating the check or otherwise) was not alleged as an element of the offense, and properly so; it is axiomatic that success in obtaining the object of the scheme is not an element of mail fraud. See, e.g. *United States v. Curtis*, 537 F.2d 1091, 1095 (10th Cir.) cert. denied, 429 U.S. 962 (1976). The crime was completed when the Hollises devised the scheme and used the mails in furtherance thereof. Hence, the subsequent money transaction involving funds derived from the fraudulent scheme constituted no part of the alleged mail fraud offense. (Emphasis in original).

The Petitioner argued exactly the opposite on appeal, that the conviction for mail fraud was an essential element, as mandated by statute and the court's instructions to the jury for the offense of engaging in a monetary transaction. Under both the statute and the court's instruction, a conviction was mandated of mail fraud in Counts 4 and 8 before a conviction could have been obtained under Counts 5, 6, 7, 9 and 10. Therefore, further convictions under Counts 5, 6, 7, 9, and 10 were barred by the Double Jeopardy provisions of the United States Constitution, Fifth Amendment as interpreted by *Grady v. Corbin*.

Had the prosecution wanted to have obtained convictions for engaging in a monetary transaction, such could have occurred only under the *Grady v. Corbin* analysis if there was not an earlier prosecution and conviction of Counts 4 and 8 involving mail fraud. Having sought and obtained convictions of Counts 4 and 8, the Government was then barred from seeking further, additional and successive prosecution and punishment for engaging in a monetary transaction, as outlined in Counts 5, 6, 7, 9 and 10.

This Court has long tried to draw distinctions between double jeopardy concerns, such as those outlined in cases such as *Brown v. Ohio* and *Grady v. Corbin*, in contrast with *United States v. Garrett*. Recently, this Court addressed this issue and the difficulties in discerning where to draw the line in *United States v. Felix*, 60 U.S.L.W. 4259, 112 S.Ct. 1377, 118 L.Ed.2d 25 (1992). As this Court is well aware, *Felix* was a multi-layered, long-term, comprehensive drug conspiracy involving prosecution in multiple jurisdictions.

In recognizing the difficulty with these double jeopardy issues, this Court held:

> Faced with the necessity of reconciling this long standing authority with our language in *Grady*, we choose to adhere to the Bayer-Pinkerton line of cases dealing with the distinction between conspiracy to commit an offense and the offense itself. These are separate offenses for double jeopardy purposes. The majority of the Court of Appeals below essentially read *Grady* as substituting for the "same offense language of the Double Jeopardy Clause a test based on whether two prosecutions involved the 'same conduct'" . . . . The Court of Appeals for the Second Circuit, in *United States v. Calderone*, 917 F.2d 717 (1990), upheld a claim of double jeopardy by divided vote, with each judge on the panel writing an opinion interpreting the critical language from *Grady* differently. That court decided that the "conduct" at issue in a conspiracy prosecution is not the agreement itself, but the conduct from which the government asked the jury to infer that there is an agreement. 917 F.2d at 712. Judge Newman filed a concurring opinion, concluding that *Grady* bars a subsequent prosecution only when previously prosecuted conduct will be used to establish the entirety of an element of the second crime. See, 717 F.2d at 723-725 (Newman, J., concurring). Other courts of appeals, as described in more detail in Footnote #2, have rejected

> double jeopardy claims in similar situations. It appears that while *Grady* eschewed a "same evidence" test and *Garrett* rejected a "single transaction" test, *Garrett v. United States*, *supra*. 471 U.S. at 790, 105 S.Ct. at 2417, **the line between those tests and the "same conduct" language of *Grady* is not easy to discern**. 112 S.Ct. at 1385 (Emphasis added).

Another case of interest is *McIntyre v. Trickey*, 938 F.2d 899 (8th Cir. 1992). The *McIntyre* case similarly applied *United States v. Felix*, 112 S.Ct. 1377 (1992), wherein the *Grady* rule was limited to "single course of conduct" offenses rather than those offenses involving "multilayered conduct as to time and place" such as conspiracy. By *Felix*' standard, if a single course of conduct is involved, the court must then determine whether one of the charged offenses is a "species of lesser-included offense" or a greater offense charged in a seperate prosecution. *McIntyre*, 938 F.2d 901; see also, *Sharpton v. Turner*, 964 F.2d 1284, 1288 (2nd Cir. 1992).

Pursuant to the specific facts of *McIntyre*, neither of the charged offenses was a lesser-included offense of the other under the *Blockburger* standard, for each required proof of an element that the other does not. See *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Pursuant to *Felix*, however, even if one offense is "technically" not a lesser-included offense, it still may be considered a "'species of lesser included offense.'" *Felix*, 112 S.Ct. at 1384. Although this Court, in *Felix*, did not define that phrase, it's discussion indicated that a "species of lesser-included offense" would include an "offense that is a permissible but not necessary predicate[]" of a greater offense. *McIntyre*, 938 F.2d at 905; See also, *Sharpton*, 964 F.2d at 1288. This type of lesser offense was at issue in *Grady*, where "the State sought to rely on the two previous traffic offense convictions to sustain the homicide and assault charges . . . " *Felix*, 112 S.Ct. at 1384.

Therefore, it must be concluded, on the facts of the case at bar, that the offense of mail fraud should be viewed as a "**species**" of a lesser-

included offense of the greater offense of engaging in a monetary transaction in interstate commerce in criminally derived proceeds. See *McIntyre*, 938 F.2d at 906. Thus, as the same conduct was proven to establish the engaging in a monetary transaction offense, it was a violation of Petitioner's constitutional right against Double Jeopardy to be subsequently convicted of the latter charged offenses, as contained within Counts 5, 6, 7, 9 and 10 of the Indictment of Petitioner.

In sum, it is based upon the long standing distinction between a single criminal episode, transaction or conduct and the multi-layered, long term, multi-jurisdictional offenses that the Court seems to have drawn a line concerning which test to apply to double jeopardy claims. As there is no current brightline test available which might assist the parties to include the courts, in discerning the distinctions arising between *Garrett* and *Felix*, as compared to *Brown*, *Whalen* and *Grady*, it is requested that this Court draft such a test in order to provide constitutional guidance and direction to a current gray area of the law.

Nevertheless, applying the test that best fits the facts of the Petitioner's case, the additional prosecution for engaging in a monetary transaction fails the double jeopardy analysis and the convictions for Counts 5, 6, 7, 9 and 10 must be overturned. It is for these reasons that Petitioner requests that Writ of Certiorari be granted by this Court.

## QUESTION TWO

**Whether the Fifth Amendment Double Jeopardy Clause is violated by successive prosecution in a single trial for offenses of mail fraud and engaging in a monetary transaction where the conviction for mail fraud is a lesser included element or a species of the engaging in a monetary transaction offense.**

The Second Circuit recently handed down it's decision in *United*

*States v. Seda*, 1992 WL312601 (2nd Cir. 1992), dealing with an issue similar, if not on point to that at bar. Specifically, that court looked to the question whether an indictment may simultaneously charge bank fraud, in violation of Title 18, § 1344, and making false statements to a bank in connection with loan applications, in violation of Title 18, § 1014 of the United States Code. That appeal was brought by the Government in a criminal case where the District Court for the Southern District of New York had ruled that the indictment of defendant Seda was multiplicitous and required the prosecution to elect between the charges. The Second Circuit affirmed the order of the lower court, finding that an election of counts before trial was the proper remedy.

In that case, Seda was an officer of a bank. He was indicted on thirteen counts, eight of which were at issue in the appeal. Counts 2 through 5 charged that Seda violated §1344 by committing bank fraud by assisting and preparing and submitting to the bank fraudulent loan applications and causing the bank to issue loans pursuant to the fraudulent applications. Counts 6 through 9 charged Seda with violating §1014 by making false statements to the bank for purposes of influencing it's actions; the false statements were the same fraudulent loan applications identified in Counts 2 through 5.

The District Court for the Southern District of New York (Louis L. Stanton, Judge), ruled that the indictment was multiplicitous and ordered the Government to elect between the two sets of counts. Endeavoring to apply *Blockburger v. United States*, 284 U.S. 299 (1932), the District Judge agreed with the Government that §1014 requires a false statement, an element not required for conviction under §1344. However, he disagreed with the Government's further claim that §1344 requires an element not required for §1014.

The Second Circuit found that, to determine whether an indictment is multiplicitous, i.e. charges a single offense in more than one count, the court must inquire whether each of the provisions defining the offenses, "unambiguously authorizes punishment for a violation of it's terms," whether "the two offenses are sufficiently distinguishable from one another

that the inference that Congress intended to authorize multiple punishments is a reasonable one," and, if so, whether the legislative history evidences a contrary legislative intent. Id.; see also, *United States v. Maldonado-Rivera*, 922 F.2d 934, 969 (2nd Cir. 1990), cert. denied, 111 S.Ct. 2811 (1991); *United States v. Fiore*, 821 F.2d 127, 130 (2nd Cir. 1987); *United States v. Nakafhian*, 820 F.2d 549, 551 (2nd Cir.), cert. denied, 484 U.S. 963 (1987). The statutes are examined under the *Blockburger* test to determine whether each requires proof of a fact that that the other does not. *United States v. Seda*, 1992 WL 312601.

The Government, in *Seda*, contented that, in applying the *Blockburger* test, the court must examine only the terms of the statutes, rather than the allegations of the indictment, an approach which is recognized as correct "[i]n general". *United States v. Seda*, 1992 WL 312601; see also, *United States v. Fiore*, 821 F.2d at 131n.5. However, this Court has also recognized that the rigid "look-only-at-the-statute" approach is inappropriate in some cases where the statute covers a broad range of conduct. Thus, in *Whalen v. United States*, 445 U.S. 684, 694 (1980), the Court rejected the Government's claim that a rape charge and a felony murder charge based on the murder of the rape victim constituted offenses sufficiently separate to support consecutive punishments. This Court recognized that the statutory offense of felony murder could be proven in some cases by conduct wholly unrelated to a rape, e.g. a robbery, but ruled nevertheless that separate offenses were not present because "[i]n the present case...proof of rape is a necessary element of proof of the felony murder." Id. at 694; see, also, *Brown v. Ohio*, 432 U.S. 161, 168 (1977) (citing *In Re Nielsen*, 131 U.S. 176, 190 (1889), and Nielsen's approval of *State v. Cooper*, 13 N.J.L. 361 (1833), which held that a conviction for arson barred a subsequent felony murder indictment based on the death of the man killed in the fire); *United States v. Kragness*, 830 F.2d 842, 863-64 (8th Cir. 1987) (applying similar analysis to RICO conspiracy).

The Second Circuit, in *Seda*, recognized that some statutes covering a broad range of conduct can apply simultaneously with more focused statutes to result in multiple punishment for one act. For example,

in *United States v. Woodward*, 469 U.S. 105 (1985), this Court upheld consecutive punishments for a negative response on a currency disclosure form, ruling that separate offenses were created by Title 18, §1001 of the United States Code and Title 18, §§1058, 1101(a) of the United States Code. Section 1001 was construed to punish nondisclosure of a material fact by any trick, scheme, or device and §1058 punishes, among other things, failure to file the report required by §1101(1) for those transporting more than $5,000.00 into or out of the United States. This Court pointed out in *Woodward* that conduct violating §1058 would not necessarily violate §1001 because "[a] person could, without employing a 'trick, scheme or device,' simply and willfully fail to file a currency disclosure report." Id. at 1008. Moreover, this Court relied on legislative history indicating that, in connection with the enactment of §1058, the attention of Congress was specifically drawn to the existence of §1001. Id. at 1009. Finally, this Court, in *Woodward*, emphasized that Congress' intent to allow punishment under both statutes was shown by the fact that the statutes were directed to separate evils. Id.

As in *Seda*, Petitioner's pending case is more akin to *Whalen* than *Woodward*. In *Seda*, the district court was correct not to look rigidly at the language of the two provisions at issue, but instead to consider the allegations in that case. The Second Circuit found §1344 to be a multi-faceted statute, although perhaps not as broad as the felony-murder offense provision considered in *Whalen*.

In *Seda*, the Government claimed that Seda violated §1014 by submitting false loan applications and that his submission of these applications constituted bank fraud in violation of §1344. However, the Second Circuit found the false loan application to simply be a "species" of bank fraud, just as the killing of the rape victim in *Whalen* was a "species" of felony murder. In *Whalen*, the rape offense was a lesser-included within the felony murder offense, since the death of the victim was an extra element of the felony murder events. The Second Circuit, in *Seda*, determined the false loan application violation to not merely be a lesser-included within the bank fraud offense, but was, as charged, the same offense, because there was no element to be proved that escalated one

offense into the other.

Clearly, as *Seda* points out in form, Petitioner's cause is parallel to *Whalen* because the conviction of mail fraud, just as conviction of rape in *Whalen*, was a lesser-included within the charged offense of engaging in a monetary transaction in interstate commerce in criminally derived proceeds. In each instance, a single criminal act was broken down in stair-step form by the Government in order to inflict cumulative punishment on the defendants, to include the Petitioner.

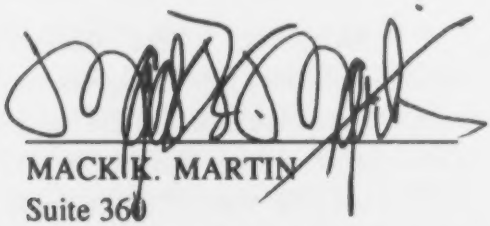
Moreover, unlike *Woodward*, there is no indication in the legislative history that Congress was likely adding the new provision as a supplement to the old. On the contrary, the legislative history as contained within Senate Report Number 99-433, House Report Number 99-855, P.L. 99-570 and 100 Stat. 3207 indicates no intent on the part of Congress to impose cumulative or separate punishment in addition to the pre-existing offenses of the same conduct and or transactions.

The Second Circuit, in *Seda*, determined that Congress was only making sure that those who submit false loan applications were punished once, if not under the previously enacted false loan applications statute, then surely under the newly enacted bank fraud statute. For all these reasons, the Second Circuit concluded that only one offense was involved. Therefore, it held that an election of counts before trial was the proper remedy. Similarly, the intent of Congress was to provide the Government with a prosecution option in the immediate instance; nevertheless, pursuant to the Petitioner's constitutional and statutory rights, the Government should, too, have been forced to elect between those counts herein at issue. As no steps were taken on either the part of the Prosecution or the District Court to insure Petitioner's rights, this Court must grant Certiorari in order to remedy those violations of double jeopardy inflicted against this Petitioner.

## CONCLUSION

WHEREFORE, Petitioner requests that this Honorable Court grant the Petition for Writ of Certiorari for those reasons as set forth herein.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that three (3) correct copies of the above and foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were served on the required parties by placing the same in the United States Mail with postage fully pre-paid, this 29th day of December, 1992 to:

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Western District of Oklahoma
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COUNSELS FOR RESPONDENT
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9143.246

No.____

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# IN THE
# SUPREME COURT OF THE UNITED STATES

## October Term, 1992

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**WILLIAM T. "TOM" HOLLIS,**

**Petitioner,**

**v.**

**UNITED STATES OF AMERICA,**

**Respondent.**

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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# APPENDICES

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**UNITED STATES COURT OF APPEALS**
**TENTH CIRCUIT**

| | | |
|---|---|---|
| **UNITED STATES OF AMERICA,** | ) | |
| **Plaintiff-Appellee,** | ) | |
| | ) | |
| **v.** | ) | **No. 91-6290** |
| | ) | |
| **PAMELA SUE HOLLIS,** | ) | |
| **Defendant-Appellant.** | ) | |
| | | |
| **UNITED STATES OF AMERICA,** | ) | |
| **Plaintiff-Appellee,** | ) | |
| | ) | |
| **v.** | ) | **No. 91-6291** |
| | ) | |
| **WILLIAM T. "TOM" HOLLIS,** | ) | |
| **Defendant-Appellee.** | ) | |

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF OKLAHOMA**
**(D.C. No. CR-91-23-T)**

---

**Mac Oyler, Oklahoma City, Oklahoma, for Appellant, Pamela Sue Hollis.**

**Mack K. Martin (Laurel S. Smith with him on the briefs), Martin Law Office, Oklahoma City, Oklahoma, for Appellant, William T. "Tom" Hollis.**

**Robert G. McCampbell, Assistant U.S. Attorney (Timothy D. Leonard, U.S. Attorney, with him on the briefs), Oklahoma City, Oklahoma, for Appellee.**

Before ANDERSON, McWILLIAMS, and SNEED, Circuit Judges.*

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STEPHEN H. ANDERSON, Circuit Judge.

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William "Tom" Hollis and Pamela Sue Hollis were convicted after a jury trial for two counts of bank fraud, in violation of 18 U.S.C. §1344; one count of submitting false financial statements to a financial institution, in violation of 18 U.S.C. §1014; two counts of mail fraud, in violation of 18 U.S.C. §1341; and three counts of engaging in a monetary transaction in interstate commerce in criminally derived proceeds, in violation of 18 U.S.C. §1957(a).[1]

Both appeal their convictions on the grounds that: (1) insufficient evidence was established to support the mail fraud counts alleged in Counts 4 and 8, (2) the government violated their rights against double jeopardy by imposing multiple convictions and sentences for the offenses alleged in Counts 1-3, 4-7, and 8-10; (3) the court improperly instructed the jury (a) by giving an instruction that the Hollises were presumed to know what the law forbids, which according to the Hollises eliminated the government's burden of proving that they "willfully" violated the law, and (b) by failing to give the Hollises' proposed instruction that repayment of the loans might negate the specific intent required to establish bank fraud; (4) the government's rebuttal argument (a) denied the Hollises a fair trial when the prosecutor commented on their reasons for exercising their right to a jury

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*The Honorable Joseph T. Sneed, Senior Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, sitting by designation.

[1]Tom Hollis was charged with two additional counts of engaging in monetary transactions in interstate commerce in criminally derived proceeds, in violation of 18 U.S.C. § 1957(a). He was convicted on one count and acquitted of the other.

trial, and (b) misstated the law as to the legal effect of the transfer of their office building property; and (5) the trial court erred in providing a supplemental jury instruction ex parte during the jury deliberations.[2] In addition, Tom Hollis argues: (1) that the district court erred in not severing Counts 1-3, 4-7, and 8-10 under Fed.R.Crim.P. 14, and (2) that his Fifth Amendment rights were violated when sworn testimony that he was previously compelled to give was admitted at trial. Finally, the Hollises attack their sentences as exceeding the maximum amount that may be imposed under the Sentencing Guidelines.

While these appeals have not been formally consolidated, for reasons of efficiency, we have companioned them for purposes of disposition. We now affirm the convictions and sentences, with the exception of the fines imposed under the Sentencing Guidelines, which we discuss below.

## I. FACTS

The Hollises were charged under a ten count indictment. Tom Hollis was named in Counts 1-10, and Pamela Hollis was named in Counts 1-8. The indictment describes three distinct criminal episodes. Counts 1-3 concern loans that the Hollises obtained to finance the purchase of an office building. Counts 4-7 concern an insurance claim that the Hollises filed after claiming that their house had been burglarized. Counts 8-10 concern an insurance claim that the Hollises submitted after their office building had been struck by lightning.

The government claims in each case that the loan or insurance proceeds were obtained by fraud through the submission of false

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[2] *Pursuant to Fed.R.App.P. 28(i), Tom Hollis has adopted the arguments made by Pamela Hollis in her opening and reply briefs. See Appellant's Br. at 1; Appellant's Reply Br. at 1. Therefore, as a convention, we have referred to some arguments as having been made by "the Hollises," even though they were articulated solely by Pamela Hollis for reasons that may have uniquely concerned her.*

documents.

A. Bank Fraud (Counts 1-3).

Counts 1 and 2 allege that the Hollises knowingly executed a scheme to obtain loans from First Interstate Bank in Oklahoma city ("First Interstate") and the Metro Area Development Corporation ("MADC") by false and fraudulent pretenses and representations in violation of 18 U.S.C. §§ 1344 and 2.

In April of 1988, the Hollises obtained a loan for $240,000 from First Interstate and a loan for $147,000 from MADC to finance the purchase of an office building located in Oklahoma City. The loans were obtained pursuant to a government guaranteed lending program at First Interstate, under which a small business could obtain a 10-year loan from First Interstate and a 20-year second mortgage loan from MADC. During the loan approval process, Melinda Fritze, the manager of the First Interstate program, required the Hollises to submit three years' tax returns, financial statements, and personal financial statements. After receipt and review of that information, First Interstate approved the loan and then turned over its credit analysis and the statements to MADC, which after independently analyzing the financial information, approved its loan.

The tax returns that the Hollises submitted to First Interstate for 1984, 1985, and 1986 showed an adjusted gross income for each year ranging from $103,072 to $151,456. The tax returns were not represented to be estimates. In fact, the 1984 and 1985 returns had already been filed with the I.R.S. Melinda Fritze required the Hollises to sign the returns to verify that they were accurate. None of the three returns accurately reflected the Hollises' adjusted gross income. The actual tax returns submitted to the I:R.S. for the same years (1984-1986) showed a loss ranging from $75,809 to $159,068.

In spite of this, the payments on both loans had been kept current. At the time of trial, $72,000 of First Interstate's principal had been paid, leaving a balance of $168,000. The MADC loan had been paid down to

$138,000 from $147,000. Further, at the time of the office building purchase, the Hollises contributed $92,000 or 20% toward the purchase. The collateral securing the loans had not deteriorated from the time the loans were made until the time of trial.

On October 1, 1988, after the loans were obtained, the Hollises submitted a financial statement to First Interstate as required by their loan agreement. The statement misrepresented the ownership of the office building, which the Hollises had deeded to Pamela Hollis, Clarence Brown and Ruby Brown; stated that the Hollises had $270,000 on deposit in banks, when in fact they had less than $100,000; reported that the Hollises had $25,000 on deposit in an account that did not exist; overstated the Hollises 1987 income; listed two pieces of real estate that the Hollises claimed to own but did not in fact own; and stated their credit card debt as $5,000, when in fact it was over $30,000. The transfer of ownership of the office building was a specific breach of the lending agreement, which if disclosed, would have allowed First Interstate to pursue various legal remedies, such as foreclosure. Disclosure of the other facts may have led First Interstate to demand further collateral or monitor the loan more vigilantly.

Count 3 alleges that these material false representations were made for the purpose of influencing the action of First Interstate upon the loan in violation of 18 U.S.C. §§ 1014 and 2.

B. Home Burglary (Counts 4-7).

Count 4 alleges that the Hollises devised a scheme to defraud Farmers Insurance Group of Companies ("Farmers") of money by filing a false insurance claim of $107,859 for items claimed to have been stolen in a house burglary that were not in fact stolen, and that in execution of the scheme, the Hollises caused the mailing of a Sworn Statement in Proof of Loss ("Sworn Statement") form, in violation of 18 U.S.C. §§ 1341 and 2.

On December 3, 1988, the Hollises reported the burglary of their home to the Oklahoma City Police Department. Thereafter, the Hollises

contacted Farmers, which had issued them a home owner's insurance policy that protected against loss from burglary. A Farmers representative met with the Hollises at their residence to inspect the scene, ascertain the facts and advise them of the policy coverage. The Hollises informed the representative that they had gone to Tulsa on business over the weekend and found that they had been burglarized when they returned.

The Farmers representative requested that Pamela find receipts for proof of purchase of the claimed stolen items and to cross-reference the receipts with a police report she was completing. Farmers was subsequently given receipts documenting the purchase of the stolen items. Farmers also received a completed Sworn Statement signed by the Hollises, which listed the items. Farmers had previously mailed the Sworn Statement form to the Hollises, and the policy required that the Sworn Statement be completed and submitted before the claim would be paid. The Farmers representative recommended that the claim be paid. The evidence presented at trial, however, as viewed in the light most favorable to the government, demonstrated that the claim was fraudulent. First, in searches executed at the Hollises' home and at the home of Pamela Hollis' parents, the FBI found several items, including a diamond pendant, Bally Lifecycle, opossum jacket, mink jacket, Casio keyboard, and other electronic equipment, that the Hollises claimed were stolen, but that were not in fact stolen. Second, the Hollises presented purchase receipts of items allegedly stolen, such as a Browning rifle and stereo equipment, that they had purchased and later returned for a refund. Third, the Hollises used a forged receipt and a delivery receipt to document the purchase of electronic equipment and expensive leather garments that they had in fact never purchased.

The Hollises' housekeeper and nanny both testified that they had been told a burglary occurred and that they were shown evidence of the burglary. However, they testified that items they were told had been stolen began reappearing in the house several months after the alleged burglary. Tom Hollis in fact conceded in a taped conversation, "Sure, I doctored some receipts given to Farmers, but that don't make me a goddamned criminal." Tr. VII at 1583. Having satisfied itself that the claims were

valid, however, Farmers issued a check to repair the security system and then issued three separate checks of $10,838, $42,155, and $33,450 toward payment of the claim. Counts 5, 6, and 7 allege that the Hollises knowingly engaged in a monetary transaction in interstate commerce in criminally derived property of a value greater than $10,000, in violation of 18 U.S.C. §§ 1957(a) and 2, when they endorsed and deposited the three insurance checks into an account controlled by them.

C. The Lightning Strike

Count 8 charges the Hollises with again violating 18 U.S.C. §§1341 and 2 in connection with another insurance claim filed with Farmers. The government alleged that the Hollises used false documents to overstate the amount of damage sustained by their office building as a result of a lightning strike. Farmers was notified of the claim when an employee of the Hollises' insurance agent mailed a property loss report to Farmers.

In order to pursue the claim, the Hollises authorized an employee named Jim Thomas to be their agent. It was Thomas who dealt primarily with the Farmers insurance adjustor and the repair and replacement vendors, although the Hollises were present and participated in a meeting with the adjustor, in which the claim was discussed.

In support of the claimed loss, Farmers received a back-dated contract for a security system that was not installed until after the lightning strike. The new security system was substantially better than that in place before the strike. Farmers also received two invoices for two telephone systems that allegedly replaced two earlier systems, when in fact a single system was replaced by another substantially better system. Further, Farmers received multiple invoices for repairs by Copy-Tek and Cowan Mechanical, two companies owned by James Cowan, a cousin of Jim Thomas. The invoices recited "William Henegar" as the Copy-Tek owner and listed the address and phone number of a Hollis employee not involved with Copy-Tek. Shelley Cowan, who kept the books of Cowan Mechanical at the time, claimed that there had been no jobs involving the amount

claimed on the Cowan Mechanical invoices.

In payment of the claim, Farmers issued two checks--one in the amount of $19,961.03 and the other in the amount of $22,068.54. Both were endorsed by Tom Hollis and deposited at a financial institution, Quail Creek Bank. Counts 9 and 10 charge Tom Hollis with additional violations of 18 U.S.C. § 1957. He was acquitted on Count 9, apparently reflecting the jury's view that a substantial amount of the proceeds of the first check was legitimately derived.

## II. SUFFICIENCY OF EVIDENCE

For three reasons, the Hollises argue that there was insufficient evidence at trial to convict them under Counts 4 and 8 of the indictment. First, the Hollises argue that the prosecution failed to establish the use-of-mails element of the mail fraud offenses alleged in Counts 4 and 8. Second, they argue that one of the prosecution's two theories of a fraudulent scheme under Count 4 lacked sufficient evidence and that reversal of the conviction is therefore required, since it is impossible to determine on which theory the jury relied. Third, they argue that no evidence supports the finding that they participated in the fraudulent scheme alleged in Count 8.

In reviewing a sufficiency of evidence challenge, "the relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

### A. Use of Mails Element.

To satisfy the use-of-mails element of the mail fraud counts alleged in Counts 4 and 8, the government was required to prove two things. First, the government was required to prove that the mails were used "for the purpose of executing" the fraudulent scheme. 18 U.S.C. § 1341.

"'The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law.'" *Schmuck v. United States*, 489 U.S. 705, 709-11, 109 S.Ct. 1443, 1447, 103 L.Ed.2d 734 (1989) (quoting *Kann v. United States*, 323 U.S. 88, 95, 65 S.Ct. 148, 151, 89 L.Ed. 88 (1944)). To satisfy this requirement, "the use of the mails need not be an essential element of the scheme." Id. (citation omitted). "It is sufficient for the mailing to be 'incident to an essential part of the scheme,' or 'a step in [the] plot.' " Id. (citations omitted).

A rational jury could have found that mailings used to satisfy both counts of mail fraud were "incident to an essential part of the scheme." The mailing supplied to satisfy Count 4 was the mailing of the Sworn Statement to the Hollises. Evidence demonstrated both that the Hollises used the Sworn Statement to make their claim and that they could receive no money for the claim without completing the Sworn Statement. Tr. IV at 664. Thus, the scheme's success depended upon obtaining the Sworn Statement, and the mails were incident to this essential part. The mailing alleged to satisfy Count 8 was the mailing of the property loss report to Farmers' claim office by the Hollises' insurance agent, after the agent had been notified of the Hollises' claim. The scheme would not have succeeded had Farmers not received written notice of the claim, Tr. V at 915, and it was undisputed that the mails were used to give the notice. So again, the use of the mails was "incident to an essential part of the scheme."

However, proof that the mails were in fact used is not by itself sufficient. The government was also required to prove that the Hollises "knowingly cause[d]" the mails to be used. 18 U.S.C. §1341. As interpreted, this language only requires a showing that the Hollises could reasonably foresee the use of mails. "Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used." *Pereira v. United States*, 347 U.S. 1, 8-9, 74 S.Ct. 358, 363, 98 L.Ed. 435 (1954) (citation

omitted). See also *United States v. Warren*, 747 F.2d 1339, 1344-46 (10th Cir. 1984); *United States v. Curtis*, 537 F.2d 1091, 1095 (10th Cir.), cert. denied, 429 U.S. 962, 97 S.Ct. 389, 50 L.Ed.2d 330 (1976). The Hollises argue that the evidence was insufficient to meet even this standard. We disagree.

The mailings alleged to supply the use-of-mails element in both counts were made in the ordinary course of the claims-settlement process. Ronald Doke of Farmers testified, as to Count 4, that as a matter of company and industry policy, upon notice of a claim, Farmers mails to the insured a Sworn Statement form so the insured can submit it as required by the insurance contract. Tr. IV at 660-65. Marsha Thompson, an employee of the Hollises' agent, testified, as to Count 8, that for every property loss claim, the agent completes and files with the insurer a property loss report. Sometimes these reports may be "called in," but in cases involving storm loss, the written report must be mailed in. Tr. V at 914-16. This evidence, combined with evidence that the Hollises had owned and operated several insurance agencies, Tr. VII at 1629-30, permitted the inference that the Hollises caused, or could reasonably foresee the mailings. See, e.g., *United States v. Bortnovsky*, 879 F.2d 30, 38 (2d Cir. 1989) ("The courts, when construing the mail fraud statute in the context of schemes to defraud an insurance company, have consistently held that defendants 'caused' mailings that are part of the ordinary claims process." (citations omitted)); *United States v. Kuzniar*, 881 F.2d 466, 472 (7th Cir. 1989) (correspondence concerning documents that insured was contractually obligated to submit in support of claim was reasonably foreseeable); *United States v. Smith*, 934 F.2d 270, 273 (11th Cir. 1991) ("We agree that it is foreseeable that communications ['between insurance agents and their home offices'] involving the policy, the details of the claim, or requests for the payment of the claim would be mailed."); id. at nn. 15-16 (citing cases).

B. Two Theories of Fraudulent Scheme.

The Hollises next argue that the prosecution, with implicit support from the court's instructions, supplied two separate theories of the

fraudulent scheme alleged in Count 4: that no burglary in fact occurred as represented by the Hollises, or alternatively, that a burglary occurred, but the Hollises "padded" the claim with items represented as stolen that had in fact not been stolen. The Hollises argue that there was insufficient evidence to support a finding that a burglary never occurred. Consequently, they argue that since the jury may have inappropriately rendered its decision on that basis, the mail fraud conviction and related money laundering convictions should be reversed. See, e.g., *Zant v. Stephens*, 462 U.S. 862, 881, 103 S.Ct. 2733, 2745, 77 L.Ed.2d 235 (1983) ("[A] general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground."). The argument is without merit.

Viewed in a light most favorable to the government, there was ample evidence in the record, as the government has carefully documented, see Br. of Plaintiff-Appellee at 7-20, to support a conclusion that the whole burglary was a hoax. The Hollises represented items as stolen (1) that had not been stolen, but had been relocated temporarily or otherwise; (2) that had never been owned by the Hollises, or (3) that had been purchased by the Hollises but later returned. To document some of these claims, the Hollises used falsified or forged receipts and invoices. The sheer number of falsified items supports the inference that the other items likewise had been represented as stolen using one of the same approaches. Further, the very fact that all the claims were so thoroughly documented was itself unusual, according to David Reinke, the insurance adjustor. Tr. II at 294. Pamela Hollis' explanation was that she had been audited by the I.R.S. for the previous three years. Id. This explanation was false. Tr III at 603; Tr. VI at 1404-05. Further, when questioned about their income to see if there was a financial motive, see Tr. II at 265, the Hollises lied and materially overstated their income. Id.; Tr. VI at 1356-65. Finally, the Hollises' housekeeper and nanny noted that items (which they were told had been stolen) disappeared on the date of the burglary, only to reappear several months later. Tr. II at 182-84; Tr. IV 727-28.

In short, the degree of deceit, planning, calculation, and the

Hollises' ability to make items disappear after the "burglary" that began to reappear a few months later allowed the jury to infer that the claimed burglary was itself staged, not merely a fortuitous event which allowed the Hollises to pad an otherwise valid claim. We will not set aside the jury's verdict as lacking sufficient evidence.

C. "No Evidence" in support of Count 8.

The Hollises' argument that no evidence supports the guilty verdict of the mail fraud alleged in Count 8 is equally groundless. They argue that the evidence is more consistent with a theory that Jim Thomas devised and executed the scheme. While the evidence may have indicated that Thomas was criminally involved, that does not necessarily negate the criminal responsibility of the Hollises. The Hollises engaged in conversations with a Farmers insurance adjustor that indicated their awareness of the nature of the claim and the monies that had been spent. Tr. V 924-25, 953, 961-62. Among other things, the claim sought payment for the replacement of a security system and a telephone system which were substantially better than the systems which existed in the office building prior to the lightning strike. Tom Hollis signed the Proof of Loss. Tr. V at 935-36. Pamela Hollis paid for the telephone system. Tr. V. at 1061-62. Both Tom and Pamela Hollis wrote a check toward payment of the security system. Pamela Hollis was that aware the security system was an upgrade of the prior system, as she was trained as to the use and features of the new system. Tr. V at 1087-88. And, in any case, the jury rationally could have presumed that the Hollises were aware of the nature of the office building equipment being replaced. From this evidence, a rational jury readily could have concluded that the Hollises knew the nature of the claim, the nature of the equipment installed, the nature of the equipment being replaced, and therefore that their claim fraudulently overstated the nature of the loss. The jury's verdict was supported by sufficient evidence.

## III. DOUBLE JEOPARDY

Next, the Hollises argue that the district court violated their rights

against double jeopardy by imposing separate convictions and sentences for the bank fraud offenses, Counts 1-3, and for the mail fraud and money laundering offenses, Counts 4-7 and Counts 8-10.

In a single prosecution, the threat of multiple punishments under distinct statutes for the same conduct raises double jeopardy concerns. See *Grady v. Corbin*, 495 U.S. 508, 516, 110 S.Ct. 2084, 2090-91, 109 L.Ed.2d 548 (1990). However, since Congress has the power to impose cumulative punishment upon a single act or punish separately each step leading to the consummation of a transaction as well as the completed transaction, *Garrett v. United States*, 471 U.S. 773, 779, 105 S.Ct. 2407, 2411-12, 85 L.Ed.2d 764 (1985) (citing *Albrecht v. United States*, 273 U.S. 1, 11, 47 S.Ct. 250, 253-54, 71 L.Ed. 505 (1927)), "our review is limited to whether Congress intended multiple convictions and sentences under the statutes." *United States v. Morehead*, 959 F.2d 1489, 1506 (10th Cir.1992).[3] In that regard, " 'the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.' " *Grady*, 495 U.S. at 516-17, 110 S.Ct. at 2090-91 (quoting *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 678, 74 L.Ed.2d 535 (1983)).

To determine whether Congress intended that the violation of each statute be a separate offense, we first look to the language of the statutes and then to legislative history. See *United States v. Lovett*, 964 F.2d 1029, 1041 (10th Cir. May 19, 1992); *Morehead*, 959 F.2d at 1506. "If Congressional intent cannot be discerned, we apply the well-settled 'rule

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[3] *In the case of successive prosecutions, a different standard applies. Under Grady, the Double Jeopardy Clause bars a subsequent prosecution in which the defendant is required to relitigate factual elements that constituted an offense charged in an earlier prosecution. 495 U.S. at 521, 110 S.Ct. at 2093. Here, however, all offenses have been charged within a single prosecution. The distinction is crucial. See Grady, 495 U.S. at 517 n. 8, 110 S.Ct. at 2091 n. 8. Multiple prosecutions raise a host of considerations not implicated by a single prosecution. See id. at 518-22, 110 S.Ct. at 2091-94. The Hollises' reliance on the Grady standard used for evaluating subsequent prosecutions is misplaced.*

of statutory construction' set forth in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)." *Morehead*, 959 F.2d at 1506. *Blockburger* states:

> [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of [an additional] fact which the other does not. 284 U.S. at 304, 52 S.Ct. at 182.

Under this analysis, Counts 1-3 do not implicate double jeopardy concerns, since the multiple violations do not arise from the same criminal behavior. The § 1344 bank fraud offenses alleged in Counts 1 and 2 involved schemes to defraud two different financial institutions. While the material misrepresentations told both victims were the same, the government was still required to prove essential facts for each offense not required by the other, such as the separate loans and the specific intent to defraud each financial institution. The § 1014 offense alleged in Count 3 arose only after the other two offenses had been committed, when the Hollises sent a new financial statement to First Interstate containing material false representations.

Again, the Hollises were not found to violate this statute based the same conduct constituting another alleged offense. Since all three counts require proof of additional facts not required by another, the three counts properly charge three separate offenses.

With regard to the § 1341 and the § 1957 offenses charged in Counts 4-7 and 8-10, the double jeopardy question has been resolved by this court's recent decision in *United States v. Lovett*, supra. There, we found that while the prosecution of both a s 1957 offense and the required predicate offense failed the *Blockburger* test, Congress intended to punish both offenses separately. *Lovett* 964 F.2d at 1042. We concluded, therefore, that the prosecution and subsequent conviction of both offenses did not violate the Double Jeopardy Clause. Id. at 1042. See also *United*

*States v. Edgmon*, 952 F.2d 1206 (10th Cir.1991) (convictions for both § 1956 and predicate offense did not violate Double Jeopardy Clause), cert. denied, --- U.S. ----, 112 S.Ct. 3037, 120 L.Ed.2d 906 (1992). *Lovett* is indistinguishable from the current case and therefore dispositive.[4]

The crime was complete when the Hollises devised the scheme and used the mails in furtherance thereof. Hence, the subsequent monetary transactions involving funds derived from the fraudulent scheme constituted no part of the alleged mail fraud offense.

## IV. JURY INSTRUCTIONS

### A. Ignorance or Mistake of Law.

The Hollises challenge the district court's instructions to the jury on two grounds. First, the Hollises argue that the court improperly instructed the jury as to the "willfully" requirement of 18 U.S.C. §2(b), which was alleged in all counts of the indictment. The Hollises argue that in order to prove they "willfully" violated the law, the government was required to prove that they specifically intended to engage in conduct they

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[4]*The Hollises also argue that even if under some factual settings a defendant may properly be convicted under both statutes, here the scheme to defraud, as alleged in this indictment, encompassed depositing the checks in order to obtain the insurance money. Consequently, they argue they are being charged under both statutes for exactly the same conduct. Whatever difference this may have made if true, the fact remains that depositing the checks is not encompassed within any alleged element of the mail fraud counts. In Counts 4 and 8, the indictment alleges inter alia that the Hollises devised a scheme to obtain money. The Hollises' actual success in obtaining the money (by negotiating the check or otherwise) was not alleged as an element of the offense, and properly so; it is axiomatic that success in obtaining the object of the scheme is not an element of mail fraud. See, e.g., United States v. Curtis, 537 F.2d 1091, 1095 (10th Cir.), cert. denied, 429 U.S. 962, 97 S.Ct. 389, 50 L.Ed.2d 330 (1976).*

knew to be a violation of the law. However, the court instructed the jury that every person is presumed to know what the law forbids. The Hollises argue that this instruction created an unconstitutional presumption as to their guilt and unlawfully shifted the burden of proof. The claim may be summarily rejected. In *United States v. Dashney*, 937 F.2d 532 (10th Cir.), cert. denied, --- U.S. ----, 112 S.Ct. 402, 116 L.Ed.2d 351 (1991), we confronted and rejected a similar claim that the term "willfully," as contained in 31 U.S.C. §5322, required a showing that defendant knew his conduct was illegal. There we noted:

> "The meaning of the term 'willful' depends upon the context in which it is used, and a requirement that an act be done 'willfully' normally does not necessitate proof that the defendant was specifically aware of the law penalizing his conduct. Where the law imposes criminal liability for certain conduct, a requirement that the conduct be 'willful' generally 'means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law.' "

*Dashney*, 937 F.2d at 538 (quoting *United States v. Scanio*, 900 F.2d 485, 489 (2d Cir.1990) (citations omitted)).

Arguing for a different result here, the Hollises rely on *Cheek v. United States*, --- U.S. ----, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991). This reliance is misplaced. "*Cheek* addresse[d] 'willfulness' in the context of criminal violations of federal tax statutes." *Dashney*, 937 F.2d at 539-40. In fact, *Cheek* emphasized the "general rule that ignorance of the law or a mistake of law is no defense," 111 S.Ct. at 609, and noted that courts historically had carved out an exception to the traditional rule and given special treatment to criminal tax offenses. In this case, the Hollises have offered no reason to interpret the term "willfully" in any sense other than that which is consistent with its traditional meaning. The district court's

instruction that the Hollises were presumed to know what the law forbids was therefore proper.[5]

B. Repayment Defense.

Second, the Hollises argue that the district court erred in refusing a requested instruction that repayment of the loan could be taken into account and might negate specific intent to defraud the financial institutions.[6] Instead of accepting the instruction, the court instructed the jury that "repayment is not a defense to bank fraud." Instruction No. 22, App. of Appellant, Tab 8. The court did instruct the jury that it could not find the Hollises guilty without finding that they specifically intended to defraud the bank. See id.

While the defendant is entitled to an instruction as to his theory of

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[5]*The Hollises also objected to the district court's instruction that: "You may consider it reasonable to draw the inference and find a person intends the natural and probable consequences of acts knowingly done or knowingly omitted." Instruction No. 32, App. of Appellant, Tab 8. The Hollises argue that this instruction creates an unlawful presumption of the type condemned in Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). The claim is meritless, as this court has already upheld this instruction against the same challenge in United States v. Vreeken, 803 F.2d 1085, 1092 (10th Cir.1986), cert. denied, 479 U.S. 1067, 107 S.Ct. 955, 93 L.Ed.2d 1003 (1987).*

[6]*Appellants' Requested Instruction #100 read:*

> *You are instructed that repayment of the loan to First Interstate Bank and to the Metro Area Development Corporation can be considered by you as a defense to the charges contained within Counts one, two and three, Bank fraud and submitting a false statement. In that regard you are instructed that these crimes require that you find that the defendant or defendants had the specific intent to defraud the financial institutions. If you find that from the evidence presented that repayment negates the specific intent to defraud the financial institutions then you must find the defendants not guilty. App. to Appellant's Br., Tab 36.*

defense if there is evidence to support it, e.g., *United States v. Pino*, 606 F.2d 908, 917 (10th Cir. 1979), the court is not required to give an instruction that misstates the law or that is already covered by other instructions. E.g., *United States v. McKinney*, 822 F.2d 946, 949 (10th Cir. 1987). As long as the instructions are correct statements of law, and fairly and adequately cover the issues presented, the trial judge is given substantial latitude and discretion in formulating the instructions. *United States v. Bryant*, 892 F.2d 1466, 1468 (10th Cir. 1989) (citations omitted), cert. denied, 496 U.S. 939, 110 S.Ct. 3220, 110 L.Ed.2d 667 (1990). Under these standards, we must reject the Hollises' argument.

A person violates the bank fraud statute when he knowingly executes a scheme to obtain money from a financial institution by means of false or fraudulent representations. 18 U.S.C. § 1344. Certainly, if a defendant never intended to provide false information, or if the misrepresentations were immaterial, then the defendant has a valid defense. However, if a defendant knowingly provided materially false information in order to induce the loan, the crime is complete, and it is irrelevant whether or not he intended to repay it or was capable of repaying it. See, e.g., *McKinney*, 822 F.2d at 949-50 (fact that "defendant later offers repayment, does not negate an earlier intent to defraud" under 18 U.S.C. § 656); *United States v. Benny*, 786 F.2d 1410, 1417 (9th Cir.) ("a good-faith belief that the victim will be repaid and will sustain no loss is no defense at all"), cert. denied, 479 U.S. 1017, 107 S.Ct. 668, 93 L.Ed.2d 720 (1986); *United States v. Acree*, 466 F.2d 1114, 1118 (10th Cir. 1972) ("The offense occurred and was complete when the misapplication [under 18 U.S.C. § 656] took place. What might have later happened as to repayment is not material and could not be a defense."), cert. denied, 410 U.S. 913, 93 S.Ct. 962, 35 L.Ed.2d 278 (1973); see also *United States v. Kelley*, 929 F.2d 582, 585 (10th Cir.) (bank fraud does not require a showing of actual pecuniary loss), cert. denied, --- U.S. ----, 112 S.Ct. 341, 116 L.Ed.2d 280 (1991).

While the proposed instruction did not state that repayment per se is a defense, it implied that repayment might "negate" the specific intent to defraud. The import of this language is unclear. Properly, repayment

could only "negate" specific intent if it makes it less probable that the Hollises knew that they were providing false information in order to induce the loan. However, here it was not likely that the rational trier of fact would conclude that the Hollises did not know they were submitting false tax returns because they were current on their repayment obligations. The more likely effect of the Hollises' instruction would be to invite the jury to equate intent to defraud the bank with intent to cause financial harm to the bank--a result directly contrary to the cases cited above. This tendency to mislead was sufficient reason to reject the instruction. See *McKinney*, 822 F.2d at 949-50 (district court did not err in rejecting instruction that "defendant's acts in protecting the banks from any loss may be considered by the jury to prove that the defendant lacked the requisite intent to defraud").

Further, if the theory of defense, distilled to its essence, was simply that the Hollises lacked the specific intent to defraud, evidence of which was provided by the fact that the loans were current, then the instructions given by the court adequately provided for the defense. The court's instruction that repayment is not a defense only made it difficult for counsel to rely on an invalid theory of defense, but it did not foreclose any rational factual argument (supported by the specific intent instruction) that the Hollises did not knowingly submit false information in order to obtain the loans. We find no error in the district court's refusal to give the tendered instruction.

## IV. GOVERNMENT'S REBUTTAL ARGUMENT

The Hollises allege prosecutorial misconduct stemming from two portions of the prosecution's rebuttal argument. In one portion, the prosecution made the following comments on the Hollises' assertion of their right to a jury trial:

> You may ask yourself, "If it's so obvious [that defendants are guilty], why do we need to have a trial?" Well, there are several reasons. One is, and the best one is, because the Constitution says so. All the defendants

have to do is say "Not guilty," and the Constitution guarantees them a full jury trial. It shouldn't be any other way.

You might say, "Well, if it's so obvious, how could they hope to win?" And think about, lots of things could have happened to prevent us from getting where we are today.

The witnesses could have been intimidated. Trudy O'Connor could have been intimidated. She could have lied.

Vicky Keeney could have continued to lie to the FBI.

Lynette Tate could have been backed off because she doesn't want to have to be accused of having some affair in front of people.

Shelly Cowan can be intimidated because she doesn't want to be cross-examined about her personal life in front of a bunch of strangers.

Those things could have happened, but they didn't. The witnesses might have forgotten. Maybe Melinda Fritze wouldn't remember which documents the accountant gave her and which ones they got from Pamela.

Maybe the files don't get subpoenaed some way. Maybe the evidence gets kicked out on some legal deal.

But none of those things have happened. None of those things have happened. The evidence is all here. The evidence has all happened.

> And if you vote innocent ... they are going to laugh at you, because the evidence is clear.

Tr. IX at 2005-06.

The Hollises maintain that the import of this argument was that the Hollises' decision to exercise their constitutional right to a jury trial was evidence that they were guilty. This comment on the exercise of a fundamental constitutional right, they say, violated the principles of a fair and impartial jury trial and removed the presumption of innocence.

Whether or not the prosecutor's statements rise to the level of constitutional error, the Hollises face a greater hurdle. They failed to preserve the issue for review by failing to object contemporaneously to the argument below. Therefore, we will only reverse for plain error. *United States v. Lonedog*, 929 F.2d 568, 570 (10th Cir.), cert. denied, --- U.S. ----, 112 S.Ct. 164, 116 L.Ed.2d 129 (1991). " 'Plain error is "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." ' " Id. (quoting *United States v. Henning*, 906 F.2d 1392, 1397 (10th Cir.1990), cert. denied, --- U.S. ----, 111 S.Ct. 789, 112 L.Ed.2d 852 (1991)). We apply a plain error analysis even when the error to which defendant failed to object is of constitutional dimension. See, e.g., *United States v. Rogers*, 921 F.2d 975, 978 (10th Cir.1990); *United States v. Taylor*, 800 F.2d 1012, 1017 (10th Cir.1986), cert. denied, 484 U.S. 838, 108 S.Ct. 123, 98 L.Ed.2d 81 (1987). And in determining whether plain error occurred, we review the prosecutor's remarks in the context of the entire record, including evidence presented and the court's instructions to the jury. See *United States v. Young*, 470 U.S. 1, 16, 19-20, 105 S.Ct. 1038, 1046-47, 1048-49, 84 L.Ed.2d 1 (1985); *United States v. Ellzey*, 936 F.2d 492, 497-98 (10th Cir.), cert. denied, --- U.S. ----, 112 S.Ct. 400, 116 L.Ed.2d 350 (1991).

Here there was no plain error. The prosecutor's soliloquy was more loquacious than prejudicial. One cannot infer from the prosecutor's remarks that a defendant is more likely to be guilty simply because he pled

not guilty and requested a jury trial. Presumably even an innocent defendant might plead not guilty and request a jury trial. While there is some suggestion that the Hollises (because they were guilty) may have requested a jury trial in order to engage in various improper tactics to protect themselves--a suggestion that is inappropriate--the prosecutor did not ask the jury to infer guilt from the Hollises' status as defendants or because they submitted to a jury trial. Any inference to that effect, in any case, was mitigated by the court's Jury Instructions No. 3 "Plea and Presumption of Innocence" and No. 4 "Burden of Proof--Reasonable Doubt," App. of Appellant, Tab 8, that made it clear that the Hollises' status as defendants at trial was not evidence of guilt. In light of this and the overwhelming evidence of the Hollises' guilt manifest in the record, we cannot say that the remarks were so prejudicial that "justice cannot have been done."[7]

The Hollises also claim that the prosecution misstated the law as to the bank fraud counts in its closing arguments. The government stated:

> Mr. Martin wants me to tell you how the bank has been defrauded even though the payments are getting made, and I'm going to do that.

---

[7]*The Hollises argue to the contrary that the error was of such a magnitude that "it could never be considered harmless" and that it should be the basis of reversal, even in the absence of a contemporaneous objection. While in carrying out a harmless-error analysis the Supreme Court has identified certain errors to be of that magnitude, and while the occurrence of such an error might also constitute "clear error," the universe of these errors is extremely small, consisting only of errors that implicate a "structural defect," such as the denial of the right to counsel and denial of the right to an impartial judge. See Arizona v. Fulminante, --- U.S. ----, ---- - ----, 111 S.Ct. 1246, 1264-65, 113 L.Ed.2d 302 (1991). The improper comment on a defendant's silence at trial, in violation of the Fifth Amendment, for example, is subject to harmless error analysis. See id., 111 S.Ct. at 1263 (citing United States v. Hasting, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983)).*

. . . .

All right, here's how the bank fraud works. As the judge has instructed you, as a matter of law, even if they're making the payments on the loan, they can still be guilty of bank fraud, and there's good reason for that.

Banks get to take mortgages in these properties. They get to have the power of sale. That's the way they protect themselves, and as perfectly normal, regular banking process and part of the federally insured banking system that they get to do this. The way the defendants chose to defeat this mortgage is by conveying the property away.

. . . .

So what happens? They start missing payments, they get behind on the loan, the bank is insecure. Federally insured bank is insecure, the SBA is insecure. What happens?

Then it comes time to talk about maybe foreclosing on the property, "Let's see about these mortgages," and First Interstate comes out of the column of people who are going to give them money and goes over to the column of people who want to get money from them.

And what happens? Just like the ex-wife and the government, all of a sudden they say, "No, no, that's not our property. We conveyed it away to Mr. and Mrs. Brown, and you can't have it."

And the mortgage, it's not signed by Mr. and Mrs. Brown; the power of sale, it's not signed by Mr. and Mrs. Brown; the loan agreements, the notes, they're not in there anywhere. And the bank, federally insured bank,

is out of luck; the SBA is out of luck.

> There are laws to protect them from exactly that circumstance, ... and when it happens, you end up in a federal courtroom in a trial, and here we are.

Tr. IX at 1996-2000 (emphasis added).

Certainly, it is improper for the prosecution to misstate the law in its closing argument. While much of the prosecutor's discussion is incomprehensible, the arguments did give the impression that the sale of the office building property defeated the lenders' security interest in the property, harming the lenders; that the bank fraud laws prevent these sales for precisely that reason; and that the Hollises transferred the property to defraud the lenders. These statements were inappropriate and misleading. Apart from the questionable accuracy as to the effect of a subsequent sale on a mortgagee's rights, the prosecution never alleged that the transfer of the office building property itself in any way constituted bank fraud. The suggestion that the bank fraud laws were designed to protect banks from borrowers that sell property in which the banks hold a mortgage was equally mischievous.

However regrettable these remarks may have been, though, defense counsel should have objected to them at the time they were made so that steps could have been taken to correct any error. On appeal, we cannot find plain error. The district court correctly instructed the jury on the elements of bank fraud. Generally, we presume that the jury followed the court's legal instructions, not the prosecutor's. See *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S.Ct. 1702, 1709, 95 L.Ed.2d 176 (1987). Further, the record contained ample evidence supporting a jury verdict under the proper legal standards. Therefore, notwithstanding the prosecutor's comments, we do not find that "justice cannot have been done."

## V. EX PARTE SUPPLEMENTARY INSTRUCTION

The Hollises, particularly Pamela Hollis, assert that the trial court committed reversible error when it answered a juror request for a supplemental instruction during deliberations, without notifying them and out of their presence.

During deliberations, the jury foreman sent the following note:

> Concerning the money laundering counts, we have a question.
>
> Does it have to be proven that the entire $10,000 was derived from criminal proceeds, or is it sufficient to know that some portion of the $10,000 + was criminally derived?

App. of Appellant, Tab 7.

At the bottom of the note, the following answer was given and apparently returned to the jury:

> An element of the offense of money laundering is that it must involve in excess of $10,000 which was criminally derived.
>
> It must be proved that in excess of $10,000 was criminally derived. Id.

The record is silent as to the exchange. However, in its brief, the government asserts that the court considered the jury request in the presence of Pamela Hollis' trial counsel, who is not her appellate counsel, Tom Hollis' trial counsel, and government counsel. Since there were no objections, no court reporter was summoned. Br. of Plaintiff-Appellee at 58.

Nevertheless, if in fact the answer was given out of the presence of Pamela and Tom Hollis and their counsel, then the district court violated Fed.R.Crim.P. 43. Federal Rule Crim.Proc. 43 guarantees to a defendant in a criminal trial the right to be present "at every stage of the trial including the impaneling of the jury and the return of the verdict." Cases interpreting the Rule make it clear, if our decisions prior to the promulgation of the Rule left any doubt, that the jury's message should have been answered in open court and that petitioner's counsel should have been given an opportunity to be heard before the trial judge responded. *Rogers v. United States*, 422 U.S. 35, 39, 95 S.Ct. 2091, 2095, 45 L.Ed.2d 1 (1975) (citations omitted). However, a Rule 43 violation is still subject to the harmless-error analysis of Fed.R.Crim.P. 52(a). See *Rogers*, 422 U.S. at 40, 95 S.Ct. at 2095. Here, if there was a violation, it was harmless, as the supplementary instruction given was entirely accurate.

Pamela Hollis argues that the instruction was erroneous, however. She reads the second sentence of the hand-written answer to state: "It must be proved that in excess of $40,000 was criminally derived." The source of this reading is a strike on the dollar sign ("$") that touches the number "1", making it resemble a number "4." The suggestion that the district court intended to write $40,000, or that the jury may have interpreted the note in this manner, is untenable. In light of the original court instructions, the jury's question, and the first sentence of the court's answer, there is no room for any rational reading other than $10,000, and the jury's acquittal of Tom Hollis on the Count 9 money laundering offense demonstrated that the jury understood its role.

## VI. IMPROPER JOINDER OF OFFENSES

Tom Hollis argues that the offenses arising from the three separate criminal episodes were improperly joined in violation of Fed.R.Crim.P. 8(a) ("Rule 8(a)") and that the district court abused its discretion in not severing the offenses under Fed.R.Crim.P. 14 ("Rule 14"). We disagree.

A question of misjoinder under Rule 8 is a question of law, subject to de novo review. See *United States v. Cardall*, 885 F.2d 656, 667 (10th

Cir.1989). There was no misjoinder. Rule 8(a) provides that "[t]wo or more offenses may be charged in the same indictment ... in a separate count for each offense if the offenses charged ... are of the same or similar character." Here the offenses arising from the bank fraud and the two mail fraud schemes are "of the same or similar character," Rule 8(a); in each case, the Hollises allegedly defrauded the victim of money through the submission of falsified documents. There was no error in that respect.

Nevertheless, even in the absence of a misjoinder under Rule 8(a), the court may order the separate trials of counts "[i]f it appears that a defendant ... is prejudiced by a joinder of offenses." Rule 14. In deciding on a motion for severance, the district court has a duty to weigh the prejudice resulting from a single trial of counts against the expense and inconvenience of separate trials. *Cardall*, 885 U.S. at 668.

"The decision whether to grant or deny severance is within the sound discretion of the trial court, and will not be disturbed on appeal unless there is an affirmative showing of an abuse of discretion." *Cardall*, 885 F.2d at 667 (citation omitted). "The burden of the defendant to show an abuse of discretion in this context is a difficult one." *United States v. Valentine*, 706 F.2d 282, 290 (10th Cir.1983) (citations omitted).

Before the district court, Tom Hollis presented two justifications for severing the counts. First, he argued that he would be required to convince a jury that "he did not commit any of the three separate, distinct and unrelated alleged criminal episodes that the government has alleged." Mem. of Mar. 25, 1991 at 5, App. to Appellant's Br., Tab 26. This "volume of episodes is prejudicial to the defendant," he asserted. Id. Second, he stated that he intended to testify as a witness in his defense at trial, but only concerning Counts 4-10. This would prejudice him, he argued, because the jury would wonder why he did not testify as to Counts 1-3, and because he might be required to exercise his Fifth Amendment privilege against self incrimination in the presence of the jury. Id.

Neither rationale mandated a severance. The district court was not required to sever the counts simply because the cumulative effect of

evidence of similar misconduct might potentially prejudice the defendant. See *United States v. Cox*, 934 F.2d 1114, 1120 (10th Cir.1991); *United States v. Taylor*, 800 F.2d 1012, 1017 (10th Cir.1986) (defendant charged with two separate armed robberies), cert. denied, 484 U.S. 838, 108 S.Ct. 123, 98 L.Ed.2d 81 (1987). "[T]he mere fact that a defendant may have a better chance for acquittal by separate trials of charges is not sufficient to require severance." *Valentine*, 706 F.2d at 290 (citation omitted).[8] Moreover, as the district court found, had separate trials been granted, the evidence of similar conduct would likely have been admissible anyway under Fed.R.Evid. 404(b), as showing intent or lack of mistake, etc. Accord *United States v. Rabbitt*, 583 F.2d 1014, 1022 (8th Cir.1978), cert. denied, 439 U.S. 1116, 99 S.Ct. 1022, 59 L.Ed.2d 75 (1979); *United States v. Evans*, 796 F.2d 264, 265 (9th Cir.1986).

As to the second rationale, in *Valentine*, supra, we established guidelines to be followed in determining whether a multi-count indictment should be severed because of a defendant's desire to testify:

> "[N]o need for a severance exists until the defendant makes a convincing showing that he has both important testimony to give concerning one count and strong need to refrain from testifying on the other. In making such a showing, it is essential that the defendant present enough information--regarding the nature of the testimony he wishes to give on one count and his reasons for not wishing to testify on the other--to satisfy the court that the claim of prejudice is genuine and to enable it intelligently

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[8] *The "volume of episodes" itself was not likely to prevent the jury from independently and fairly evaluating each offense. The nature of the jury's inquiry as to each of the episodes was similar: whether the Hollises made materially false representations; whether they knowingly did so; whether they had the specific intent to defraud the institutions, etc. Thus, the jury was not likely to be confused, as it might have, had the offenses been of a different character, and the jury could easily classify and evaluate the evidence corresponding to each alleged crime.*

> to weigh the considerations of 'economy and expedition in judicial administration' against the defendant's interest in having a free choice with respect to testifying."

*Valentine*, 706 F.2d at 291 (quoting *Baker v. United States*, 401 F.2d 958, 977 (D.C.Cir.1968), cert. denied, 400 U.S. 965, 91 S.Ct. 367, 27 L.Ed.2d 384 (1970)). Here, the district court found that Tom Hollis did not meet this burden and "failed to make any showing regarding his need to testify regarding certain counts and to refrain from testifying on other." Order of April 29, 1991 at 6, App. to Appellant's Br., Tab 28 (emphasis added). A defendant cannot require a severance by simply informing the court that he intends to testify as to some counts but not as to others. *Valentine*, 706 F.2d at 290-91. Tom Hollis has recited no evidence to suggest that he did more than that. Under these circumstances, therefore, we find that the district court did not abuse its discretion in refusing to sever the counts.

## VII. COMPELLED TESTIMONY UNDER *GARRITY*

Tom Hollis also claims that the district court erred in admitting certain sworn statements that he and his wife made. Relying on *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967), he claims that admission of the statements violated his privilege against self-incrimination.

The sworn statements in question were made to William Cathcart, an attorney for Farmers, in connection with the burglary claim. The Hollises were represented by counsel at the examination, and they were told that if they failed to submit to the examination, their claim could be denied.

In *Garrity*, the Supreme Court held that statements compelled by the government are inadmissable. The case concerned police officers who were questioned during a state investigation of traffic ticket "fixing." Each

officer was warned that anything he said might be used against him in a criminal proceeding and that if he refused to answer he could be fired. The Court held that the threat of losing their jobs to induce the officers to give up their privilege against self-incrimination made the officers' statements involuntary and therefore inadmissable in the criminal proceedings. Id. at 497, 87 S.Ct. at 618-19.

As in *Garrity*, Tom Hollis claims that his and his wife's statements were involuntary because of the threat that a refusal to speak would result in the loss of their claim. He further claims that the compulsion was state action because the attorney for Farmers was acting as an agent of the government, because Cathcart knew at the time the Hollises gave their sworn statements that the grand jury had subpoenaed Cathcart's files concerning the Hollises. We disagree.

There was no government compulsion to speak. Cathcart examined the Hollises as a private attorney acting solely on behalf of Farmers, as permitted by the contract between the company and the Hollises. The grand jury subpoena did not create an agency relationship between Cathcart and the government. Cathcart had already planned to examine the Hollises before he received the grand jury subpoena. In fact, Tom Hollis' attorney conceded at trial that Cathcart was not an agent of the government. Thus, "absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions." *Oregon v. Elsted*, 470 U.S. 298, 305, 105 S.Ct. 1285, 1291, 84 L.Ed.2d 222 (1985) (emphasis added).

## VIII. SENTENCING

Finally, the Hollises argue on several grounds that their sentences exceed the maximum amount permitted under the Sentencing Guidelines. "In evaluating these arguments, we are mindful that the district court's application of the Sentencing Guidelines to the facts of a particular case is entitled to due deference and its factual findings will not be reversed unless clearly erroneous. 18 U.S.C. § 3742(e). However, we will remand for resentencing if the Guidelines were incorrectly applied. 18 U.S.C. §

3742(f)(1)." *United States v. Urbanek*, 930 F.2d 1512, 1514 (10th Cir. 1991) (citation omitted).

A. Role in Offense.

The Hollises first argue that the district court improperly increased their offense level by two points under U.S.S.G. § 3B1.1(c), for their role in the offense. That section calls for a two-level increase if "defendant was an organizer, leader, manager, or supervisor in any criminal activity" other than one described in other provisions (sections 1(a) and (b)) that involve five or more participants. The Hollises instead argue that no adjustment should be made, as required by U.S.S.G. § 3B1.4, since the offenses were committed "by individuals of roughly equal culpability," id., comment.

Prior to sentencing, the district court was presented with evidence that the offenses involved upwards of eight participants,[9] including Tom and Pamela Hollis, Jim Thomas, who allegedly assisted in the fraudulent lightning strike claim and in carrying out the false burglary; Jim Cowan, who allegedly assisted in executing the false burglary; Eddie Elkins, the Hollises' accountant, who confessed to signing the false tax returns submitted to the lenders in connection with the bank fraud; Vicki Keeney, who was asked to destroy evidence and lie to the FBI; and C.J. and Ruby Brown, Pamela Hollis' parents. See Presentence Aff. of Garland E. Slate, Jr. at 3-4, App. to Br. of Appellee, Tab 15.

However, the district court determined:

> The evidence presented at the sentencing hearing was not sufficient to convince the Court that Pamela Hollis was the leader or organizer of five or more participants. The same is true of defendant William T. Hollis.

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[9] *"A 'participant' is a person who is criminally responsible for the commission of the offense, but need not have been convicted." U.S.S.G. § 3B1.1, comment. (n. 1).*

> However, there is a preponderance of the evidence which does show that each was an organizer, leader, manager or supervisor in a criminal activity other than that described in Section 3D1.1[ (a) and (b) ].

Tr. of Aug. 6, 1991 at 100-01, App. of Appellant, Tab 51.

We review the district court's factual determination that the Hollises exercised a leadership role under the clearly erroneous standard. *United States v. Kelley*, 929 F.2d 582, 586 (10th Cir.), cert. denied, --- U.S. ----, 112 S.Ct. 341, 116 L.Ed.2d 280 (1991). Our review of the evidence presented to the district court finds ample support for the court's finding that the Hollises were not acting alone, but were instead carrying out a supervisory role over other participants in the offenses. The court's conclusions were not clearly erroneous.

B. Acceptance of Responsibility.

The Hollises also argue that they were improperly denied a two point downward adjustment for their acceptance of responsibility. Under U.S.S.G. § 3E1.1, the offense level should be reduced "[i]f the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct."

The Hollises argue that their "voluntary payment of restitution" of certain moneys and their willingness to enter into settlement negotiations evidenced their acceptance of responsibility. However, the district court reached the contrary conclusion:

> With regard to acceptance of responsibility, it need only be said that there has been none. Any arrangement for the payment of partial restitution was done to avoid forfeiture, was not the type of act that qualifies under any construction of the law as an acceptance of responsibility, and there simply is no basis for it.

Tr. of Aug. 6, 1991 at 100, App. of Appellant, Tab 51. Whether the Hollises accepted responsibility is a factual issue subject to the clearly erroneous standard. *United States v. Dennison*, 937 F.2d 559, 566 (10th Cir. 1991), cert. denied, — U.S. —, 112 S.Ct. 886, 116 L.Ed.2d 789 (1992).

The Hollises assertion of voluntary restitution does not amount to an acceptance of responsibility. The commentary only refers to "voluntary payment of restitution prior to adjudication of guilt." U.S.S.G. § 3E1.1, comment. (n. 1(b)) (emphasis added). The Hollises signed a consent judgment as to $35,000 that had previously been seized, but this was done only after they had been found guilty. Likewise, the Hollises placed $55,000 in escrow prior to the trial, but this would only be turned over if they were found guilty.

Similarly, the Hollises willingness to settle prior to trial cannot serve as proxy to an affirmative acceptance of personal responsibility. The Hollises offered, for example, to pay $90,000 in restitution in an attempt to avoid an indictment altogether. They also rejected proposals advanced by the government. Consequently, the Hollises showed a willingness to concede responsibility only to the extent they could avoid the consequences of their criminal conduct. The conditional willingness to enter into a beneficial agreement does not "clearly demonstrate[ ] a recognition and affirmative acceptance of personal responsibility for [ ] criminal conduct." The district court's determination was not clearly erroneous.

C. Obstruction of Justice.

Next, the Hollises claim the district court erred in enhancing the Hollises' offense level by two points under U.S.S.G. § 3C1.1. This section requires the increase "[i]f the defendant willfully impeded or obstructed, or attempted to impede or obstruct, the administration of justice during the investigation or prosecution of the instant offense." U.S.S.G. § 3C1.1.

The district court gave several reasons for the enhancement:

> Vicky Keeney, a potential witness, was told by defendant William T. Hollis to lie to the FBI, and that action alone is enough to qualify as an obstruction of justice. Defendant Pamela Hollis met with her husband and Vicki Keeney when this act of obstruction took place, and it is attributable to both defendants.
>
> Moreover, Defendant Pamela Hollis participated in the preparation of a false deed which was used as evidence in the trial. The circumstances of the deed itself and the conflicting sworn testimony of Mrs. Brown in regard to the deed established by a preponderance of the evidence that the deed was false. This is directly attributable to Defendant Pamela Hollis and is but another act of obstruction which qualifies for the enhancement.
>
> . . . .
>
> In addition, William T. Hollis threatened a potential witness regarding her testimony. This is directly attributable to him and is clearly an obstruction of justice.

Tr. of Aug. 6, 1991 at 99-100, App. of Appellant, Tab 51.

We review the district court's factual determinations as to the obstruction of justice under the clearly erroneous standard, *Urbanek*, 930 F.2d at 1514, and based on this record, we cannot find that the district court's factual findings alluded to above were clearly erroneous. Having made these findings, the district court correctly applied the guidelines. The commentary makes clear that the enhancement was intended to be applied when a defendant directs another to destroy or conceal evidence, see U.S.S.G. § 3C1.1, comment. (n. 1(b)),[10] produces or attempts to produce a false document, see id., comment. (n. 1(c)), or threatens or intimidates a witness, see id., comment. (n. 1(d)). This is precisely what the district court found to have happened here. No error was committed.

D. Excessive Fine.

The Hollises claimed that the fine imposed by the district court was excessive. The district court calculated the fine range to be $141,598 to $424,794, based on the pecuniary gain to the appellant as the minimum, see U.S.S.G. § 5E1.2(c)(1)(B), and three times that amount as the maximum, see id. (c)(2)(C). The district court was required to impose a fine in all cases, U.S.S.G. § 5E1.2(a), and it imposed on each appellant a fine of $141,598, which it explicitly stated was "based on the minimum of the guideline range." See J. of William T. Hollis at 5 of 7, App. to Appellant's Br., Tab 46; J. of Pamela Sue Hollis at 5 of 7, App. of Appellant, Tab 22. However, the district court also ordered restitution by each appellant in the amount of $141,598. All parties agree that the effect of this was to reduce the minimum of the fine range to $10,000. See U.S.S.G. § 5E1.2(c).[11] Because of this, the Hollises urge us to revise the sentence and impose the minimum fine of $10,000. The government asks us to uphold the fine, since it was still within the proper fine range.

We reject both approaches. It is evident that the district court miscalculated the fine range. Further, it is impossible to determine whether the district court would have imposed a fine of $10,000, or $141,598, or some other amount, had it believed the minimum was $10,000. See *United States v. Washington-Williams*, 945 F.2d 325, 326-27 (10th Cir.1991) (discussing ambiguity created by the incorrect fine range identified in the judgment). The "choice of the wrong guideline range is

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[10]*During the incident involving Ms. Keeney, Tom Hollis, who was accompanied by Pamela, asked Ms. Keeney to dispose of a typewriter that the Hollises had previously loaned to her and which had been listed as stolen on the burglary report.*

[11]*U.S.S.G. § 5E1.2(c)(1) provided that: "The minimum of the fine range is the greater of: (A) the amount shown in column A of the table below [which was $10,000 for an offense level of 23]; or (B) the pecuniary gain to the defendant, less restitution made or ordered." (emphasis added).*

an incorrect application of the Sentencing Guidelines." Id. at 326 (citations omitted). As required by 18 U.S.C. § 3742(f)(1), therefore, we vacate the fine and remand both cases for further sentencing proceedings to reconsider the imposition of a fine within the correct fine range.

E. Disparity in Sentences.

Finally, Tom Hollis complains that his sentence of 57 months imprisonment was arbitrary, since his wife's sentence was for 46 months, and she was the more culpable of the two. We disagree. Whatever reasons the district court may have had for imposing different sentences, and they may be several,[12] they are not reviewable by this court, as long as they fall within the applicable guideline sentence range. See, e.g., *United States v. Garcia*, 919 F.2d 1478, 1482 (10th Cir.1990). Tom Hollis concedes that the sentence falls within the applicable guideline sentence range of 46 to 57 months, for a total offense level of 23. Therefore, we decline to review that portion of the sentence.[13]

For the reasons stated above, we VACATE each fine and REMAND the cases for reconsideration of the imposition of a fine in accordance with this opinion. In all other respects, the Hollises' convictions and sentences are AFFIRMED.

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[12]*For example, Tom Hollis was convicted of an additional money laundering offense of which Pamela Hollis was not convicted. Further, Tom Hollis himself requested at sentencing that the court "would have some type of leniency towards my wife." Tr. of Aug. 6, 1991 at 103, Br. of Plaintiff-Appellee at 71.*

[13]*The Hollises also argued that the district court erred in not ordering a downward departure from the guidelines under 18 U.S.C. § 3553(b). The Hollises now concede that the refusal to depart downward is not reviewable. See United States v. Davis, 900 F.2d 1524, 1528-30 (10th Cir.1990).*

**UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

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|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff-Appellee, | ) | |
| | ) | |
| v. | ) | No. 91-6291 |
| | ) | |
| WILLIAM T. "TOM" HOLLIS, | ) | |
| | ) | |
| Defendant-Appellant. | ) | |

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**JUDGMENT**
**ENTERED SEPTEMBER 11, 1992**

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Before McKAY, McWILLIAMS, SNEED*, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL and KELLY, Circuit Judges.

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*The Honorable Joseph T. Sneed, Senior Circuit Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

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This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk

# IN THE UNITED STATES DISTRICT COURT
# FOR THE WESTERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | Case No. CR-91-28-T |
| Plaintiff, | ) | |
| | ) | Violation: |
| -vs- | ) | |
| | ) | 18 U.S.C. §2 |
| WILLIAM T. "TOM" HOLLIS, | ) | 18 U.S.C. §1014 |
| and PAMELA SUE HOLLIS, | ) | 18 U.S.C. §1341 |
| | ) | 18 U.S.C. §1344 |
| Defendants. | ) | 18 U.S.C. §1957(a) |

## INDICTMENT

The Federal Grand Jury charges:

## COUNT I

1. At all times relevant to this Indictment, First Interstate Bank of Oklahoma N.A. ("First Interstate") was a federally insured financial lending institution with offices in the Western District of Oklahoma; a bank, the deposits of which were insured by the Federal Deposit Insurance Corporation ("FDIC").

2. From a date unknown to the Grand Jury, but prior to October 1, 1987, until on or about the date of this Indictment,

----------WILLIAM T. "TOM" HOLLIS
and
PAMELA SUE HOLLIS,----------

the defendants herein, devised and intended to devise a scheme and artifice to obtain money, funds, and assets under the custody and control of First Interstate by obtaining a loan based upon false information presented to the lending institution.

3. It was part of said scheme to obtain a loan that:

a. The defendants knowingly presented and caused to be presented false information to First Interstate regarding their past income and their assets.

b. The defendants knowingly presented and caused to be presented false copies of tax returns for the years 1984, 1985, and 1986.

c. The defendants knowingly presented and caused to be presented financial information concerning the year 1987 which materially overstated their income for that year.

d. The false tax returns and false financial information presented to First Interstate materially misrepresented to First Interstate the defendants' ability to repay the loan.

4. On or about April 8, 1988, in the Western District of Oklahoma,

----------WILLIAM T. "TOM" HOLLIS
and
PAMELA SUE HOLLIS,----------

the defendants herein, did knowingly execute the scheme by obtaining a loan of $240,000.00 from First Interstate by means of false and fraudulent pretenses and representations.

All in violation of Title 18, United States Code, Sections 1344 and 2.

## COUNT 2

5. At all times relevant to this Indictment, Metro Area Development Corporation ("MADCO") was a non-profit, certified development company authorized by the Small Business Administration of the United States of America and was a financial institution organized and operating under the laws of the United States.

6. From a date unknown to the Grand Jury, but prior to October 1, 1987, until on or about the date of this Indictment,

----------WILLIAM T. "TOM" HOLLIS
and
PAMELA SUE HOLLIS,----------

the defendants herein, devised and intended to devise a scheme and artifice to obtain money, funds, and assets under the custody and control of MADCO by obtaining a loan based upon false information presented to the lending institution.

7. It was part of said scheme to obtain a loan that:

a. The $147,000.00 loan from MADCO was negotiated and agreed upon by the defendants as part of the loan package with the First Interstate loan referred to in Count 1 above.

b. The scheme employed the same elements as are specified in paragraph 3, which is incorporated herein.

c. MADCO relied upon the same materials that were presented to First Interstate including the false tax returns and false financial information.

d. The false tax returns and false financial information materially misrepresented to MADCO the defendants' ability to repay the loan.

8. On or about May 11, 1988, in the Western District of Oklahoma,

----------WILLIAM T. "TOM" HOLLIS
and
PAMELA SUE HOLLIS,----------

the defendants herein, did knowingly execute the scheme by obtaining a loan of $147,000.00 from MADCO by means of false and fraudulent pretenses and representations.

All in violation of 18 United States Code, Sections 1344 and 2.

## COUNT 3

9. The Grand Jury realleges all of the facts set forth in paragraph 1 above.

10. On or about October 1, 1988, in the Western District of Oklahoma,

----------WILLIAM T. "TOM" HOLLIS
and
PAMELA SUE HOLLIS,----------

the defendants herein, knowingly made and caused to be made material false representations in a Financial Statement submitted to First Interstate for the purpose of influencing the action of First Interstate to decline to request additional security on the loan and to decline to declare the Loan Agreement to have been breached.

11. The Financial Statement dated October 1, 1988, included material false representations regarding the ownership of real property located at 12401 N. May, Oklahoma City, Oklahoma, the ownership of other real property, and facts concerning the defendants' financial condition.

All in violation of 18 United States Code, Sections 1014 and 2.

## COUNT 4

12. At all times material to this Indictment, Farmers Insurance Group of Companies ("Farmers Insurance Group") was an insurance company operating in the Western District of Oklahoma.

13. Farmers Insurance Group insured the household goods of the defendants against, among other things, the risk of burglary during the period including December 3, 1988.

14. From a date unknown to the Grand Jury, but prior to December 3, 1988, until on or about the date of this Indictment, in the Western District of Oklahoma and elsewhere,

----------WILLIAM T. "TOM" HOLLIS
and
PAMELA SUE HOLLIS,----------

the defendants herein, devised and intended to devise a scheme and artifice to obtain money and property from Farmers Insurance Group by false representations and pretenses.

15. It was part of said scheme that:

a. The defendants represented and caused to be represented to Farmers Insurance Group that their home, located at 12901 Deerfield Court, Oklahoma City, Oklahoma, had been burglarized on December 3, 1988, and over $100,000.00 of goods stolen, when in fact, as the defendants well knew, their burglary claim was false.

b. The defendants knowingly represented and caused to be represented as stolen certain items which had not been stolen and over which they retained control.

c. The defendants knowingly represented and caused to be represented as stolen certain items which had never been owned by the defendants.

d. The defendants knowingly represented and caused to be represented as stolen certain items which had been returned by the defendants to the place of purchase.

e. The defendants used a Sworn Statement in Proof of Loss to claim a loss of $107,859.00, when, as the defendants well knew they had not actually suffered such a loss.

f. The defendants acted to conceal from Farmers Insurance Group and law enforcement authorities the fraudulent nature of the insurance claim.

16. On or about December 16, 1988, in the Western District of Oklahoma,

----------WILLIAM T. "TOM" HOLLIS
and
PAMELA SUE HOLLIS,----------

the defendants herein, for the purpose of executing the scheme, did receive and cause to be received an envelope containing a "Sworn Statement in Proof of Loss" to allow the defendants to make a claim on the insurance policy issued by Farmers Insurance Group, which envelope had been placed in an authorized mail depository to be sent and delivered by the U.S. Postal Service, according to the instructions thereon, from Farmers Insurance Group's office in Oklahoma City, Oklahoma, to the defendants at 12901 Deerfield Court, Oklahoma City, Oklahoma.

All in violation of 18, United States Code, Sections 1341 and 2.

## COUNT 5

17. The Grand Jury realleges all of the facts set forth in paragraphs 12 through 16 of this Indictment as though fully set forth herein.

18. At all times relevant to this Indictment, account number 1038855 at Quail Creek Bank was styled "Oklahoma Farmers and Merchants Association" and was owned and controlled by the defendants.

19. On or about January 4, 1989, in the Western District of Oklahoma,

----------WILLIAM T. "TOM" HOLLIS
and
PAMELA SUE HOLLIS,----------

the defendants herein, knowingly engaged in a monetary transaction in interstate commerce in criminally derived property of a value greater than $10,000.00, where the criminally derived property was in fact the proceeds of a mail fraud in violation of 18 U.S.C. §1341. to wit: the defendants caused to be endorsed and deposited into account number 1038855 at Quail Creek Bank, Farmers Insurance Group's draft number 929027-14 in the amount of $10,838.10, well knowing that the draft represented partial proceeds of the criminal activity set forth in Count 4.

All in violation of Title 18, United States Code, Sections 1957(a) and 2.

## COUNT 6

20. The Grand Jury realleges all of the facts set forth in paragraphs 12 through 16 of this Indictment as though fully set forth herein.

21. At all times relevant to this Indictment, account number

18016265 at Quail Creek Bank was styled "Pam Hollis, Trustee for Krysta Hollis" and was owned and controlled by the defendants.

22. On or about February 2, 1989, in the Western District of Oklahoma,

----------WILLIAM T. "TOM" HOLLIS
and
PAMELA SUE HOLLIS,----------

the defendants herein, knowingly engaged in a monetary transaction in interstate commerce in criminally derived property of a value greater than $10,000.00, where the criminally derived property was in fact the proceeds of a mail fraud in violation of 18 U.S.C. §1341, to wit: the defendants caused to be endorsed and deposited into account number 18016265 at Quail Creek Bank, Farmers Insurance Groups's draft number 929990-14 in the amount of $42,155.00, well knowing that the draft represented partial proceeds of the criminal activity set forth in Count 4.

All in violation of Title 18, United States Code, Sections 1957(a) and 2.

## COUNT 7

23. The Grand Jury realleges all of the facts set forth in paragraphs 12 through 16 of this Indictment as though fully set forth herein.

24. At all times relevant to this Indictment, account number 18016265 at Quail Creek Bank was styled "Pam Hollis, Trustee for Krysta Hollis" and was owned and controlled by the Defendants.

25. On or about February 2, 1989, in the Western District of Oklahoma,

----------WILLIAM T. "TOM" HOLLIS

and

PAMELA SUE HOLLIS,----------

the defendants herein, knowingly engaged in a monetary transaction in interstate commerce in criminally derived property of a value greater than $10,000.00, where the criminally derived property was in fact the proceeds of a mail fraud in violation of 18 U.S.C. §1341, to wit: the defendants caused to be endorsed and deposited into account number 18016265 at Quail Creek Bank, Farmers Insurance Group's draft number 929991-14 in the amount of $33,450.15, well knowing that the draft represented partial proceeds of the criminal activity set forth in Count 4.

All in violation of Title 18, United States Code, Sections 1957(a) and 2.

## COUNT 8

26. At all times material to this Indictment, Farmers Insurance Group was an insurance company operating in the Western District of Oklahoma.

27. Farmers Insurance Group also insured the defendants' office building located at 12401 N. May, Oklahoma City, Oklahoma, against, among other things, the risk of damage by lightning for the period including June 13, 1989.

28. From a date unknown to the Grand Jury, but prior to June 13, 1989, until on or about the date of this Indictment, in the Western District of Oklahoma,

----------WILLIAM T. "TOM" HOLLIS

and

PAMELA SUE HOLLIS,----------

the defendants herein, devised and intended to devise a scheme and artifice to obtain money and property from Farmers Insurance Group by false

representations and pretenses.

29. It was part of said scheme that:

a. The defendants represented to Farmers Insurance Group that their office building, located as 12401 N. May, Oklahoma City, Oklahoma, had suffered over $50,000.00 in damage as a result of a lightning strike, when, in fact, as the defendants well knew, the building and its contents had not sustained over $50,000.00 worth of damage.

b. The defendants notified their insurance agent of the alleged claim.

c. The defendants knowingly utilized false contracts, receipts, and other documents to overstate the amount of money necessary to repair and replace items allegedly damaged.

d. The defendants acted to conceal from Farmers Insurance Group and law enforcement authorities the fraudulent nature of the insurance claim.

30. On or about June 13, 1989, in the Western District of Oklahoma,

----------WILLIAM T. "TOM" HOLLIS
and
PAMELA SUE HOLLIS,----------

the defendants herein, for the purpose of executing the scheme, did cause to be placed in an authorized mail depository to be sent and delivered by the U.S. Postal Service, according to the instructions thereon, from the office of Insurance Agent Everett Walker in Oklahoma City, Oklahoma, to the claims office of Farmers Insurance in Oklahoma City, Oklahoma, an envelope containing a "Property Loss Report" to allow the defendants to make a claim on the insurance policy issued by Farmers Insurance Group.

All in violation of Title 18, United States Code, Sections 1341 and 2.

## COUNT 9

31. The Grand Jury realleges all of the facts set forth in paragraphs 23 through 27 of this Indictment as though fully set forth herein.

32. At all times relevant to this Indictment, account number 1038877 at Quail Creek Bank was styled "Oklahoma Farmers and Merchants Association" and was owned and controlled by the defendants.

33. On or about June 30, 1989, in the Western District of Oklahoma,

----------WILLIAM T. "TOM" HOLLIS----------

the defendant herein, knowingly engaged in a monetary transaction in criminally derived property of a value greater than $10,000.00, where the criminally derived property was in fact the proceeds of a mail fraud in violation of 18 U.S.C. § 1341, to wit: the defendant caused to be endorsed and deposited, into account number 1038877 at Quail Creek Bank, Farmers Insurance Group's draft number 042725-14 in the amount of $19,961.03, well knowing that the draft represented partial proceeds of the criminal activity set forth in Count 8.

All in violation of Title 18, United States Code, Sections 1957(a) and 2.

## COUNT 10

34. The Grand Jury realleges all of the facts set forth in paragraphs 26 through 30 of this Indictment as though fully set forth herein.

35. At all times relevant to this Indictment, account number 1038855 at Quail Creek Bank was styled "Oklahoma Farmers and Merchants Association" and was owned and controlled by the defendants.

36. On or about July 28, 1989, in the Western District of Oklahoma,

----------WILLIAM T. "TOM" HOLLIS----------

the defendant herein, knowingly engaged in a monetary transaction in criminally derived property of a value greater than $10,000.00, where the criminally derived property was in fact the proceeds of a mail fraud in violation of 18 U.S.C. §1341, to wit: the defendant caused to be endorsed and deposited into account number 1038855 at Quail Creek Bank, Farmers Insurance Group's draft number 057877-14 in the amount of $22,068.54, well knowing that the draft represented partial proceeds of the criminal activity set forth in Count 8.

All in violation of Title 18, United States Code, Sections 1957(a) and 2.

A TRUE BILL:

FOREMAN OF THE GRAND JURY

TIMOTHY D. LEONARD
United States Attorney

ROBERT B. McCAMPBELL
Assistant U. S. Attorney

TIMOTHY W. OGILVIE
Assistant U. S. Attorney

4434 U.S. Courthouse
200 NW 4th Street
Oklahoma City, OK 73102-3094
(405) 231-5281

RGM:ad

**FILED**
**September 3, 1992**
Robert D. Dennis, Clerk
U.S. Dist. Court, Western Dist. of Okla.

# United States District Court

**Western District Court Of Oklahoma**

UNITED STATES OF AMERICA
V.
WILLIAM T. HOLLIS
(Name of Defendant)

**THIRD AMENDED**
**JUDGMENT IN A CRIMINAL CASE**
(For Offenses Committed on or After November 1, 1987)
Case Number: CR-91-23-T
Mack Martin
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____.

☒ was found guilty on count(s) 1, 2, 3, 4, 5, 6, 7, 8, and 10 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

| Title & Section | Nature of Offense |
|---|---|
| 18:1344 & 2 | Devised and intended to devise a scheme and artifice to obtain money, funds, and assets under the custody and control of a federally insured financial lending institution by obtaining a loan based upon false information presented to the lending institution. |

Date Offense Concluded: July, 1989 Count Number(s): 1

| | |
|---|---|
| 18:1344 & 2 | Devised and intended to devise a scheme and artifice to obtain money, funds, and assets under the custody and control of a financial institution organized and operating under the laws of the United States by obtaining a loan based |

upon false information presented to the lending institution.

Date Offense Concluded: July, 1989 Count Number(s): 2

18:1014 & 2 Knowingly made and caused to be made material false representations in a financial statement submitted to a federally insured financially lending institution by obtaining a loan based upon false information presented to the lending institution.

Date Offense Concluded: July, 1989 Count Number(s): 3

18:1341 & 2 Knowingly execute the scheme by obtaining a loan from an insurance company by false representations and pretenses.

Date Offense Concluded: July, 1989 Count Number(s): 4

18:1957(a) & 2 Knowingly engaged in a monetary transaction in interstate commerce in criminally derived property of a value greater than $10,000.00, where the criminally derived property was in fact the proceeds of a mail fraud.

Date Offense Concluded: July, 1989 Count Number(s): 5

18:1957(a) & 2 Knowingly engaged in a monetary transaction in interstate commerce in criminally derived property of a value greater than $10,000.00, where the criminally derived property was in fact the proceeds of a mail fraud.

Date Offense Concluded: July, 1989 Count Number(s): 6

18:1957(a) & 2 Knowingly engaged in a monetary transaction in interstate commerce in criminally derived property of a value greater than $10,000.00, where the criminally derived property was in fact the proceeds of a mail fraud.

Date Offense Concluded: July, 1989 Count Number(s): 7

18:1341 & 2 Devised and intended to devise a scheme and artifice to obtain money and property from an insurance company by false representations and pretenses.

Date Offense Concluded: July, 1989 Count Number(s): 8

18:1957(a) & 2 Knowingly engaged in a monetary transaction in interstate commerce in criminally derived property of a value greater than $10,000.00, where the criminally derived property was in fact the proceeds of a mail fraud.

Date Offense Concluded: July, 1989 Count Number(s): 10

Defendant: William T. Hollis Judgment – Page 3 of 9
Case Number: CR-91-23-T

The defendant is sentenced as provided in pages 3 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) 9 and is discharged as to such count(s).

☐ Count(s) _____ (is) (are) dismissed on the motion of the United States.

☒ It is ordered that the defendant shall pay a special assessment of $ 50.00 per count, totaling $450.00 , for count(s) 1, 2, 3, 4, 5, 6, 7, 8, and 10 , which shall be due ☒ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 441-52-4902

Defendant's Date of Birth: January 29, 1950

Defendant's Mailing Address:

12901 Deerfield Court

Oklahoma City, OK 73142

Defendant's Residence Address:

12901 Deerfield Court

Oklahoma City, OK 73142

August 6, 1991

Date of Imposition of Sentence

Signature of Judicial Officer

RALPH G. THOMPSON
UNITED STATES DISTRICT JUDGE

Name & Title of Judicial Officer

September 3, 1992

Date

Defendant: William T. Hollis Judgment – Page 4 of 9
Case Number: CR-91-23-T

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 57 months on each of counts 1, 2, 4, 5, 6, 7, 8, and 10; and 24 months on count 3, to be served concurrently.

☒ The court makes the following recommendations to the Bureau of Prisons:
FCI El Reno, Oklahoma

☐ The defendant is remanded to the custody of the United States marshal.

☐ The defendant shall surrender to the United States marshal for this district.

☐ at _____ on _____.
as notified by the United States marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

☒ at 12:00 noon on September 6, 1991.

☐ as notified by the United States marshal.

☐ as notified by the probation office.

## RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____,

with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: William T. Hollis Judgment – Page 5 of 9
Case Number: CR-91-23-T

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years for each of counts 1, 2, 4, 5, 6, 7, 8, and 10; and 1 year on count 3, all terms to run concurrently .

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☒ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

☐ The defendant shall not possess a firearm or destructive device.

☒ The defendant shall submit a complete and accurate financial statement, in the form of an affidavit, each year. The defendant is further ordered to provide the probation office access to any requested financial information.

## STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptance reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: William T. Hollis Judgment – Page 7 of 9
Case Number: CR-91-23-T

The defendant is shall pay a fine of $ 10,000.00 . The fine includes any costs of incarceration and/or supervision.

☐ This amount is the total of the fines imposed on individual counts, as follows:

☐ The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

This fine plus any interest required shall be paid:

☒ in full immediately.

☐ in full not later than _____ .

☐ in equal monthly installments over a period of ____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.

☐ in installments according to the following schedule of payments:

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

## RESTITUTION AND FORFEITURE

### RESTITUTION

☒ The defendant shall make restitution to the following persons in the following amounts:

| Name of Payee | Amount of Restitution |
|---|---|
| Farmers Insurance Group of Companies | $141,598.00 |

Payments of restitution are to be made to:

- ☒ the United States Attorney for transfer to payee(s).
- ☐ the payee(s).

Restitution shall be paid:

- ☐ in full immediately.
- ☐ in full not later than _____ .
- ☐ in equal monthly installments over a period of ____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.
- ☐ in installments according to the following schedule of payments:
- ☒ as directed by the U.S. Probation Office.

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

### FORFEITURE

☐ The defendant is ordered to forfeit the following property to the United States:

Defendant: William T. Hollis Judgment – Page 9 of 9
Case Number: CR-91-23-T

## STATEMENT OF REASONS

☐ The court adopts the factual findings and guideline application in the presentence report.

OR

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Role in the offense is a 2 level enhancement, not a 3 level enhancement as originally stated in the report.

Guideline Range Determined by the Court:

Total Offense Level: 23

Criminal History Category: 1

Imprisonment Range: 46 to 57 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 10,000 to $ 424,794.00

☐ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ 141,598

☐ Full restitution is not ordered for the following reason(s):

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following reason(s):

**FILED**
**August 31, 1992**
Robert D. Dennis, Clerk
U.S. Dist. Court, Western Dist. of Okla.

**In the United States District Court for the Western District of Oklahoma**

UNITED STATES OF AMERICA, Plaintiff,
vs.
WILLIAM T. HOLLIS, Defendant.

No. CR-91-23-T

**ORDER**

The court finds that the original fine, $141,598, imposed as part of this defendant's original sentence, was incorrectly calculated.

U.S.S.G. § 5E4.2(c)(1) directs that the minimum of the guideline fine range is the greater of the pecuniary gain, less restitution, made or ordered. The minimum of the original guideline fine range should have been $10,000, as the court ordered restitution of $141,598.

Accordingly, it is ordered that the original fine of $141,598 is vacated and a fine of $10,000 is hereby imposed. In all other respects, the court's original sentence remains in full force and effect.

IT IS SO ORDERED this 31st day of August, 1992.

UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, Plaintiff, | ) | |
| -vs- | ) | CR-91-23-T |
| WILLIAM T. "TOM" HOLLIS, and PAMELA SUE HOLLIS, Defendant. | ) | |

**MOTION AND MEMORANDUM OF LAW TO DISMISS COUNTS 5, 6, 7, 9 AND 10 OF THE INDICTMENT FOR MULTIPLICITY**

COMES NOW the Defendant, William T. "Tom" Hollis, by and through his Attorney of Record, and moves this court for it's order dismissing Counts 5, 6, 7, 9 and 10 of the indictment due to multiplicity of prosecution. In furtherance of said motion, the defendant would show the court as follows, to wit:

1. The indictment as it now stands against the defendant is in violation of Federal Rules of Criminal Procedure Rule 8 and 14. These violations of the Federal Rules occurred due to the government's attempt to prosecute and have this defendant receive multiple sentences for the same conduct.

2. The defendant is charged in a ten count indictment. Count 4 charges mail fraud (18 U.S.C. 1341 and 2). This offense in Count 4 arises out of an alleged burglary of the defendant's residence on December 3rd, 1988. As a result of the burglary and the government's alleged mail fraud, three separate insurance drafts outlined in Counts 5, 6 and 7 of the indictment were issued to the defendants. These three insurance drafts, Counts 5, 6 and 7 formed

the basis of the government's prosecution for engaging in a monetary transaction as defined by 18 U.S.C. 1957(A). Count 8 of the indictment alleges the crime of mail fraud (18 U.S.C. 1341 and 2). This count of the indictment is based upon an insurance claim on the defendant's business Real Estate involving lightning damage on June 13, 1989. Counts 9 and 10 of the indictment are based upon Insurance Company drafts issued to the defendants which forms the basis of the government's charges of engaging in a monetary transaction (18 U.S.C. 1957 (a) and 2).

3. In both of these alleged criminal episodes, the government is seeking multiple prosecution and punishment for one offense.

The Double Jeopardy Clause states:

> ... [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb....

United States Constitution Fifth Amendment.

Multiplicity of prosecution violates the Fifth Amendment to the United States Constitution. Multiplicity occurs when one offense is charged in two or more counts of the same indictment. The multiplicitous indictment raises the serious problem of a defendant receiving multiple sentences for the same offense. This is a violation of the Double Jeopardy Clause. See United States v. Hearod, 499 F.2d 103 (5th Cir. 1974).

This principle was recognized in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 1980, 76 L.Ed 306 (1932). In that case the United States Supreme Court recognized that the Double Jeopardy Clause of the Fifth Amendment prohibited successive prosecutions for the same criminal act or transaction under two criminal statutes whenever each statute does not require proof of a fact the other does not.

Since the Blockburger case in 1932, the Supreme Court has modified that rule on successive prosecutions as violative of the double jeopardy clause. See, Illinois v. Vitale, 447 U.S. 410, 65 L.Ed.2d 228,

100 S.Ct 2260 (1980), wherein the court suggested that even if two successive prosecutions were not barred by the Blockburger test, the second prosecution would be barred if the prosecution sought to establish an essential element of the second crime by proving the conduct for which the defendant was convicted of in the first prosecution.

Most recently in Grady v. Corbin, 495 U.S. _ 110 S.Ct. __, 109 L.Ed.2d 548 (1990), the United States Supreme Court further adopted a standard not to rely on the Blockburger test to vindicate double jeopardy clause protection against multiple prosecution claims.

> Because of these independent concerns, we have not relied exclusively on the Blockburger test to vindicate the double jeopardy clauses's protection against multiple prosecutions. As we stated in Brown v. Ohio:
>
> > "The Blockburger test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense. Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first." 432 U.S. at 166-167, in 6, 53 L.Ed2d 187, 97 S.Ct 221. Grady v. Corbin, 109 L.Ed.2d at 563.

Other Supreme Court cases have not applied the Blockburger test in determining multiple prosecutions and multiplicity issues. See Whalen v. United States, 445 U.S. 684 (1980). The court determined that a defendant could not be separately punished for rape and for killing the same victim in the perpetration of the rape, because it is not the case that each statute requires proof of a fact that the other does not. See also,

Harris v. Oklahoma, 433 U.S. 682, 53 L.Ed.2d 1054, 97S.Ct. 2912 (1977), where a defendant who was convicted of felony murder based upon conduct of participating in a store robbery with another person who shot the clerk, was then tried and convicted of robbing the store. The Supreme Court reversed the store robbery lesser included crime which was proved in the offense of felony murder.

It is the defendant's contention that to obtain convictions in Counts 5, 6, 7, 9 and 10, the government must first prove the violations as outlined in Counts 4 and 8 of the indictment. This is exactly the situation that the court in Harris v. Oklahoma, sought to prohibit. In Grady v. Corbin, 495 U.S. __, 110 S.Ct __, 109 L.Ed.2d 548 (1990), the court clearly recognized the deficiencies of the Blockburger analysis.

> These cases all recognize that a technical comparison of the elements of the two offenses as required by Blockburger does not protect defendants sufficiently from the burdens of multiple trials. This case similarly demonstrates the limitations of the Blockburger analysis. If Blockburger constituted the entire double jeopardy inquiry in the context of successive prosecutions, the state could try Corbin in four consecutive trials: . . . The State could improve it's presentation of proof with each trial, accessing which witnesses gave the most persuasive testimony, which documents had the greatest impact, and which opening and closing arguments most persuaded the jurors. Corbin would be forced either to contest each of these trials or to plead guilty to avoid harassment and expense. 109 L.Ed.2d at 564.

"The court in Grady, ultimately held, "the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in the prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." 109 L.Ed.2d at 564. Finally, so there can be no doubt as to the test to be applied concerning double jeopardy and successive

prosecution or multiplicity, the court held, "[w]e have concluded that the Double Jeopardy Clause of the Fifth Amendment demands application of the standard announced today . . . . ." 109 L.Ed.2d at 566.

Applying this "new standard" to the facts of this case it is straight forward. The government must obtain a conviction of Count 4 in order to obtain multiple convictions of Counts 5, 6, 7, and likewise the government must obtain a conviction in Count 8 in order to obtain multiple convictions in Counts 9 and 10. Thus, pursuant to Grady, the double jeopardy clause bars the prosecution and sentencing of an engaging in a monetary transaction as the government must rely on proving conduct for which the defendant will have already been prosecuted and convicted in Counts 4 and 8 of the indictment.

Title 18, U.S.C. 1957 (a) provides:

> (a) whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000.00 dollars and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

Under this very statute a conviction for which the government seeks in it's indictment mandates that the defendants be convicted of the previous Counts 4 and 8. This application of the law is altogether in violation of Grady v. Corbin.

Under the Grady v. Corbin analysis the government is attempting to seek multiple prosecution and multiple punishment of these defendants. By the governments prosecution for engaging in a monetary transaction the government must establish to obtain it's convictions conduct that constitutes an offense for which the defendants will have already been prosecuted.

WHEREFORE, for the reasons set forth above the defendant requests that this court enter it's order dismissing Counts 5, 6, 7, 9 and 10

of the indictment due to multiplicity in violation of Grady v. Corbin, and the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution.

Respectfully Submitted,

MACK K. MARTIN
Suite 360
119 North Robinson Avenue
Oklahoma City, Oklahoma 73102
(405) 236-8888
ATTORNEY FOR PETITIONER
WILLIAM T. "TOM" HOLLIS

**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, Plaintiff, | ) | |
| -vs- | ) | CR-91-23-T |
| WILLIAM T. "TOM" HOLLIS, and PAMELA SUE HOLLIS, Defendant. | ) | |

CERTIFICATE OF SERVICE

I certify that I mailed a full, true and correct copy of the above and foregoing instrument to the United States Attorney's office, Western District of Oklahoma, 4434 United States Courthouse, Oklahoma City, Oklahoma 73102 and Mr. Jack L. Freeman, Attorney at Law, 2600 S. Broadway St., Edmond, Oklahoma, 73013, Attorney for Pamela S. Hollis, on this ___ day of _____, 1991.

_____

9102.40

**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, Plaintiff, | ) | |
| -v- | ) | CR-91-23-T |
| WILLIAM T. "TOM" HOLLIS, and PAMELA SUE HOLLIS, Defendant. | ) | |

**SUPPLEMENTARY BRIEF IN SUPPORT OF MOTION AND MEMORANDUM OF LAW TO DISMISS COUNTS 5, 6, 7, 9 AND 10 OF THE INDICTMENT FOR MULTIPLICITY**

COMES NOW the Defendant, William T. "Tom" Hollis, by and through his Attorney of Record, and supplements his earlier motion and memorandum of law in the above styled cause. In furtherance of said supplement the Defendant would show the Court as follows, to wit:

On February 28, 1991, the United States Court of Appeals for the Tenth Circuit entered a decision in the case of United States v. Felix, __ F.2d __ (10th Cir. 1991), No. 89-7058, 48 Crl 1511 (BNA). In that case the court reversed a number of convictions resulting from a second trial due to significant duplication.

The Tenth Circuit adopted the approach of Grady v. Corbin, 495 U.S. ___, 109 L.Ed.2d 548, 110 S.Ct. ___ (1990),

> Thus, a subsequent prosecution must do more than merely survive the Blockburger test. . . . [T]he Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that

constitutes an offense for which the defendant has already been prosecuted. The critical inquiry is what conduct the state will prove, not the evidence the state will use to prove the conduct. 48 CrL at 1511.

The Tenth Circuit also was in accord with the decision of United States v. Calderone, ___F.2d ___, 48 CrL 1133 (2nd Cir. 1990). In that case the defendant won a directed verdict based on insufficiency of the evidence in an international multi-drug smuggling conspiracy case. The government then filed a new narrower indictment overlapping the old indictment in time and some overt acts. The Calderone Court held that the same conduct test of Grady, barred prosecution on all counts.

These same basic reasons would similarly apply to the prosecution in Counts 5, 6, 7, 9 and 10 of this indictment. By the application of Grady, Felix and Calderone, the prosecution of those counts is barred on due process, double jeopardy multiplicity grounds.

WHEREFORE, for the reasons set forth above the defendant requests that this court enter it's order dismissing Counts 5, 6, 7, 9 and 10 of the indictment due to multiplicity in violation of Grady v. Corbin, and the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution.

Respectfully Submitted,

MACK K. MARTIN
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(405) 236-8888
Attorney for Defendant,
William T. "Tom" Hollis

**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, Plaintiff, | ) | |
| -vs- | ) | CR-91-23-T |
| WILLIAM T. "TOM" HOLLIS, and PAMELA SUE HOLLIS, Defendant. | ) | |

CERTIFICATE OF SERVICE

I certify that I mailed a full, true and correct copy of the above and foregoing instrument to the United States Attorney's office, Western District of Oklahoma, 4434 United States Courthouse, Oklahoma City, Oklahoma 73102 and Mr. Jack L. Freeman, Attorney at Law, 2600 S. Broadway St. Edmond, Oklahoma 73013 Attorney for Pamela S. Hollis, on this ___ day of _____, 1991.

_____

9102.43

# IN THE UNITED STATES DISTRICT COURT
# FOR THE WESTERN DISTRICT OF OKLAHOMA

| | | |
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| **UNITED STATES OF AMERICA,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **v.** | ) | **Case No. CR-91-23-T** |
| | ) | |
| **WILLIAM T. "TOM" HOLLIS and PAMELA SUE HOLLIS,** | ) | |
| | ) | |
| **Defendants.** | ) | |

## ORDER

Defendants William T. "Tom" Hollis and Pamela Sue Hollis are jointly charged in a ten count indictment. Counts one through three allege that the defendants fraudulently obtained a loan on April 8, 1988, from First Interstate Bank and on May 11, 1988, from the Small Business Administration to finance the purchase of an office building. Counts four through seven allege that the defendants fraudulently obtained and illegally laundered insurance proceeds from Farmers Insurance Group ("Farmers") with regard to an alleged burglary of their home on December 3, 1988.[1] The remaining counts, eight through ten, allege that the defendants fraudulently obtained and illegally laundered insurance proceeds from Farmers with respect to damage to the office building on June 13, 1989.[2]

Several pretrial motions have been filed by the defendants. Tom

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[1] *Count four charges the defendants with mail fraud; counts five, six and seven allege that the defendants illegally laundered the proceeds of the mail fraud -- three insurance drafts.*

[2] *Count eight charges the defendants with mail fraud; counts nine and ten allege that the defendants illegally laundered the proceeds of the mail fraud -- two insurance drafts.*

Hollis has challenged the government's joinder of allegedly unrelated charges in the indictment and seeks the dismissal of counts five, six, seven, nine and ten due to multiplicity. Pamela Sue Hollis has filed a motion, adopted by her codefendant, which requests disclosure of the grand jury testimony. Each motion will be discussed and disposed of separately.

Defendant Tom Hollis contends that he is improperly charged with three separate and unrelated criminal episodes. He asserts that he is prejudiced by the government's joinder of offenses because he will have to defend against distinct episodes of alleged criminal behavior in one trial. In response, the government argues that Rule 8 permits two or more offenses to be charged in the same indictment when they are based on acts or transactions that are connected together or constitute parts of a common scheme or plan. The counts in the indictment allege a common scheme, the government assets, which consisted of the defendants' creation and presentation of false documents to victims in order to obtain money from them.

In resolving questions of joinder, the court initially must determine whether the counts are properly joined under Fed.R.Crim.P. 8(a). United States v. Hutchings, 751 F.2d 230, 235-36 (8th Cir. 1984), cert. denied, 474 U.S. 829 (1985). If there is no misjoinder, the court then must consider whether severance is required under Rule 14, due to prejudice to the defendant.

Rule 8(a) provides:

> (a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

The court finds that the offenses are sufficiently related to permit their prosecution in one case. The mail fraud and money laundering counts charging insurance fraud clearly are of a similar character, see Hutchings, 751 F.2d at 233-36, and the fraud counts pertaining to the purchase of the office building and the insurance claim for damage to it are interrelated and part of a common scheme. See United States v. Ruiz, 894 F.2d 501 (2nd Cir. 1990); United States v. Evans, 796 F.2d 264, 265 (9th Cir. 1986); ("Joinder of counts relating to pension plan embezzlement and counts relating to fraud on a creditor did not violate Fed.R.Crim.P. 8(a)..."); Hutchings, 751 F.2d at 235-36 ("Although differences exist among the charges as to who was defrauded and how the fraud was actually implemented, all of the charges basically stem from Hutchings' use of his position as president of U.S.C. to obtain money for himself and his corporation through fraudulent misrepresentations concerning the premiums of insurance policies sold by U.S.C.")

Other courts have reached the same conclusion when presented with multi-count indictments charging several distinct categories of offenses. For example, in United States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979) criminal charges were brought against the defendant that related to three separate occurrences: (1) his acceptance of an indirect payoff to assist automobile dealers in obtaining relief from an inventory tax; (2) unsuccessful solicitation of a payoff for assisting in the passage of legislation favorable to Missouri truckers and (3) his agreement to help an architectural firm (Berger-Field-Torno-Hurley, Architects and Planners, Inc.) obtain state contracts. The Eighth Circuit held that the charges were properly joined under Rule 8 as:

> All the offenses charged stem from misconduct while Rabbit was a public official. The circumstances surrounding S.B. 110 and H.B. 1336 may appear unrelated to those surrounding Berger-Field. However, all three can be characterized as connected by a common plan. The charges all originate from Rabbitt's scheme to obtain money because of his power, authority, and influence as a legislator. The principals of the Berger-Field firm testified

> they sought Rabbitt's political influence as a legislator. The S.B. 110 and H.B. 1336 counts deal with Rabbitt's use of his position as a legislator. Rabbitt laundered his payoffs as legitimate legal fees. The offenses, although distinct, possess sufficient similarity to render joinder appropriate under Rule 8.

Id. at 1021.

Another challenge to joinder was dismissed by the Fifth Circuit in United States v. Cartwright, 632 F.2d 1290 (5th Cir. 1980). The defendant in that case was charged with committing two classes of offenses - misapplication of the funds of a federally insured institution and making false statements to federally insured lenders. The court concluded that the two factually distinct categories of offenses were substantially similar in character and, thus, properly joined because they all were crimes of deceit involving federally insured lending institutions.

Having concluded that joinder of the bank fraud, mail fraud, and money laundering charges does not violate Rule 8(a), the court must determine whether severance is required under Rule 14. That Rule provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires...

Defendant Hollis asserts he will be prejudiced by one trial because he intends to testify regarding some, but not all counts of the indictment. The jury will question, he argues, why his testimony is limited and, on cross-examination, he may have to exercise his privilege against self-incrimination in the jury's presence. These problems and the resulting undue prejudice can be resolved, defendant Hollis maintains, by requiring

the plaintiff to elect, pursuant to Rule 14, which of the three, separate incidents it wishes to prosecute at trial. The government responds that to establish the prejudice required to obtain a severance under Rule 14, the defendant must show specific facts that demonstrate both his need to testify on some counts and his unwillingness to testify with regard to others.

In United States v. Valentine, 706 F.2d 282, 291 (10th Cir. 1983), the Tenth Circuit established guidelines to be followed in determining whether a multi-count indictment should be severed because of a defendant's desire to testify.[3] Those guidelines are:

> [N]o need for a severance exists until the defendant makes a convincing showing that he has both important testimony to give concerning one count and strong need to refrain from testifying on the other. In making such a showing, it is essential that the defendant present enough information-regarding the nature of the testimony he wishes to give on one count and his reasons for not wishing to testify on the other-to satisfy the court that the claim of prejudice is genuine and to enable it intelligently to weigh the considerations of "economy and expedition in judicial administration" against the defendant's interest in having a free choice with respect to testifying.

The court concurs with the government that defendant Hollis has not met his burden in this case as he has failed to make any showing regarding his need to testify regarding certain counts and to refrain from testifying on others. Id.; United States v. Hernandez, 829 F.2d 988, 991 (10th Cir. 1987), cert.denied, 485 U.S. 1013 (1988) ('"An accused should show the specific testimony he will present about one offense, and his specific reasons for not testifying about others, to justify severance." United States v. Bronco, 597 F.2d 1300, 1303 (9th Cir. 1979).' See also

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*[3]These were adopted from the D.C. Circuit Court of Appeals' decision of Baker v. United States, 401 F.2d 958 (D.C. Cir. 1968), cert. denied, 400 U.S. 965 (1970).*

United States v. Tranakos, 911 F.2d 1422, 1432 (10th Cir. 1990)). Therefore, severance is not mandated by defendant Hollis' prospective testimony.

Contrary to defendant Hollis' apparent argument, severance also is not required because of the potential cumulative effect created by trying all counts jointly. This contention also was raised unsuccessfully in Rabbitt, 583 F.2d at 1022. The court in Rabbitt found that, if the counts were not joined, the evidence of the defendant's corrupt conduct would have been admissible as evidence of similar behavior in each of the separate trials. Here, too, the evidence of the separate transactions probably would be admissible under Fed.R.Crim.P. 404(b). See Evans, 796 F.2d at 265 (severance of counts relating to pension plan embezzlement and to fraud on a creditor not required under Rule 14 because the "evidence relating to each group of counts would have been admissible in a separate trial on the other group of counts to show intent, lack of mistake, etc."

Defendant Tom Hollis also has filed a motion seeking the dismissal of counts five, six, seven, nine and ten of the indictment on the grounds of multiplicity. He contends the government is seeking multiple prosecution and punishment for one offense because, to obtain convictions on counts five, six, seven, nine and ten (money laundering), it must first obtain convictions on counts four and eight (mail fraud). Therefore, he asserts, pursuant to Grady v. Corbin, ___ U.S. ___ (1990) the double jeopardy clause bars the prosecution of the money laundering counts, as they are dependent on his being convicted of mail fraud.

Defendant's reliance on Grady is misplaced. The issue here is not successive prosecutions, but whether Congress intended to allow a defendant to be punished not only for committing mail fraud, but also for engaging in a monetary transaction with the proceeds of that crime. As noted by the Tenth Circuit in United States v. Hampton, 786 F.2d 977 (10th Cir. 1986).

[T]he double jeopardy guarantee serves principally as a

> restraint on courts and prosecutors while the legislature remains free to fix punishments. And, although the Court conceded in Missouri v. Hunter, 459 U.S. 359, 365, 103 S.Ct. 673, 677, 74 L.Ed.2d 535, that the double jeopardy clause may not be totally inapplicable to the legislative branch, the Court in Albernaz v. United States, 450 U.S. 333, 344, 101 S.Ct. 1137, 1145, 67 L.Ed.2d 275, said, at least in the context of multiple punishments in a single proceeding, "the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed.

The court concludes the legislature intended to allow the two statutory offenses to be punished cumulatively. See generally, United States v. Hampton, 786 F.2d 977 (10th Cir. 1986) (conviction and consecutive sentencing for both violation of the substantive RICO charge and the Hobbs Act racketeering charges which served as the predicate offenses for the RICO conviction not prohibited by the Fifth Amendment's double jeopardy provision).[4] See also United States v. York, 888 F.2d 1050 (5th Cir. 1989). Dismissal of the money laundering counts, therefore, is not required.

The remaining motion in this case consists of that filed by defendant Pamela Sue Hollis in which she seeks disclosure of all grand jury testimony pertaining to the subject matter of the indictment. Defendant Hollis states that she has a particularized need for the testimony, as it will assist her attorney in cross-examining, impeaching, and refreshing the recollection of trial witnesses; in preparing a pretrial motion to dismiss the indictment, and in preparing for trial. The motion has been adopted by codefendant William T. "Tom" Hollis.

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*[4]This holding was subsequently reaffirmed in United States v. Lane, 883 F.2d 1484, 1493 (10th Cir. 1989), cert. denied, ___ U.S. ___ (1990).*

To a large extent the motion is moot, because the government concedes that grand jury transcripts of government trial witnesses constitute Jencks material, which will be produced to the defendants in accordance with the joint discovery memorandum. The motion also is moot to the extent that is seeks Brady material, as the government acknowledged its obligation of disclosure under Brady in the joint discovery memorandum and will voluntarily disclose any Brady materials. Insofar as the defendants' request exceeds the disclosure required by the Jencks Act and Brady, it is denied, as the defendants fail to make the particularized need necessary to require disclosure under Fed.R.Crim.P. 6(e)(3)(C)(i). See United States v. Warren, 747 F.2d 1339, 1347 (10th Cir. 1984).

Accordingly, the defendants' motions for relief from prejudicial joinder, to dismiss and for disclosure of grand jury testimony are denied.

IT IS SO ORDERED this 29th day of April, 1991.

/s/ Ralph G. Thompson
UNITED STATES DISTRICT JUDGE